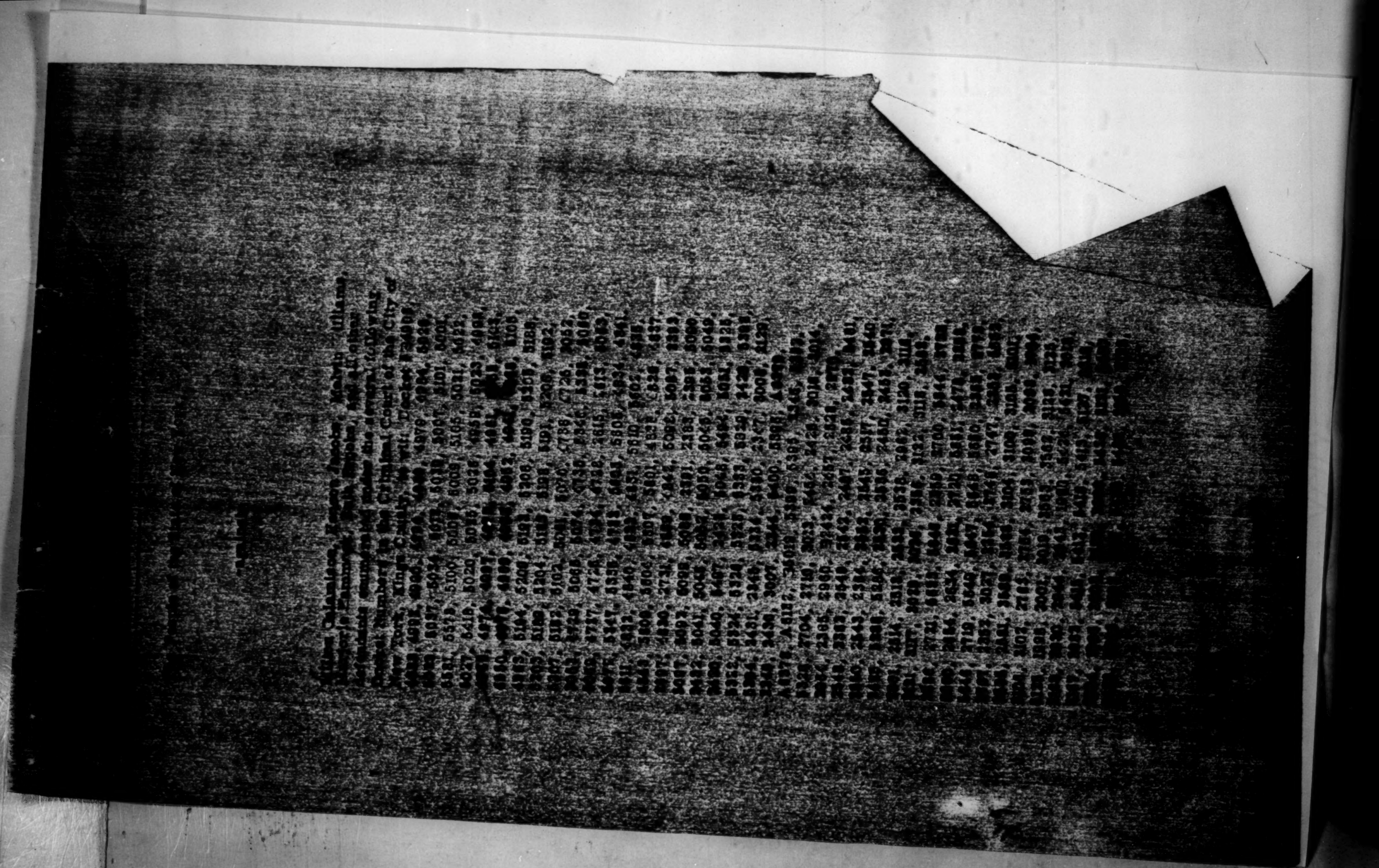

5459, 2729, 4926, 5433, 5431, 2127, 2957, 5594,
3010, 5490, 5484, 3195, 3188, 5595, 2727, 3011,
3441, 5437, 5432, 3159, 3156, 5489, 5488, 5488,
5485, 2128, 3194, 3189, 4925, 2954, 2951, 2128,
5434, 5429, 5433, 5428, 3223, 3221, 2622, 2619,
5173, 2526, 2521, 5174, 2134, 3168, 3163, 2681,
2644, 2761, 2758, A5810, B6457, 3073, 3070,
2757, 2328, 2408, 2406, 2409, 2407, 2328, 2342,
2357, 2323, A5811, B6458, 32238, 2332, 2760,
2755, 2717, 2718, 2737, 2738, 2665, 2734, 2470,
All of 1963.

Defendants.

Upon the annexed affidavit of RAY V. WILLIAMS, one of the Attorneys for the above-named defendants, duly sworn to the 27th day of February, 1964, and upon the Exhibit attached thereto, let the District Attorney of the County of Kings show cause before this Court, at Criminal Term, Part I thereof, held in the County of Kings, at the Courthouse, Borough of Brooklyn, City of New York, on the 5th day of March, 1964 at 9:30 a.m. or as soon thereafter as Counsel can be heard, why Order should not be made for a Certificate that it is reasonable that the charges against the above-named or denominated defendants, now pending in the Criminal Court of the City of New York, County of Kings, be prosecuted by indictment, and for such other and further relief as to the Court may seem just and proper in the premises.

Sufficient cause appearing therefore; let all proceedings [redacted] in the Criminal Court of the City of New York, County of Kings until the hearing and determination of this motion; let service of a copy of this order with a copy of the affidavit and Exhibit upon which it is granted upon the District Attorney, County of Kings and upon the Clerk of the Criminal Court, County of Kings on or before 5:00 p.m., February 28th, 1964 be deemed due and

-2-

sufficient service.

That no previous application has been made to this Court for the relief sought herein.

That this motion is brought to this Court by way of Order to Show Cause because many of the cases above-denominated are marked for trial starting March 9th, 1964.

Dated: Brooklyn, New York
February 28th, 1964

U.S.D.J.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

- -x

The People of the State of New York

-against-

Milton Galamison, Henson Jacobs, Melvin Williams, Marjorie Hamnock, Ruth Brooks, et al.,

Defendants.

- -x

STATE OF NEW YORK)
SS.:
COUNTY OF KINGS)

RAY H. WILLIAMS, being duly sworn , deposes and says:

1. I am one of the attorneys for the defendants above named or denominated, having my office at 1160 Fulton Street, Brooklyn, New York.

2. That I am familiar with all the facts and circumstances upon which the informations and charges in the Criminal Court of the City of New York, Kings County, against the within defendants are based.

3. That although the charges against the defendants are variously brought under Sections 722, 1851, 483 and 244 (one case) of the Penal Law, the situs of the alleged acts, the overt acts charged in the several informations the similarity of ostensible intent, the relatively common questions of law present and the uniformity of the proceedings heretofore had herein in the Criminal Court of the City of New York (including the position of said cases on the Trial Calendar therein), it is reasonable that this motion be brought in the name of all the defendants above named or denominated.

4. That beginning in July, 1963 and continuing to approximately the end of September, 1963, the within defendants were arrested at the site or in the immediate environs of, a community of buildings now under construction known as the Downstate Medical Center, which buildings are located at Clarkson and Albany Avenues, Brooklyn, N.Y.

5. That upon information and belief the said buildings are being erected under the supervision of the State of New York, financed by New York State and New York City Funds.

6. That the defendants herein have been uniformly identified in demonstrating and protesting against unlawful discrimination in employment practices with respect to persons of Negro ancestry and other minority groups existing at the said site of construction. That the existence of such unlawful and discriminating employment practices is fully set forth in the attached Exhibit, which applies fully to the [redacted]

7. That the [redacted] and informations charging violation of [redacted] each of the following Sections of the Penal Law have been filed against each of the several defendants herein, to wit; Sections 722, 1851, 483 and 244 [redacted]

8. That although the [redacted] affidavits and informations herein are drawn in classic statutory form, the substance of all the charges, in effect, involve the constitutionally protected rights vouchsafed by the 1st and 14th Amendments of the Federal Constitution.

9. That the judgments to be rendered upon the affidavits and informations herein will be far-reaching in effect, and will regulate and determine a matter of great general interest in this Community, City State and Nation. The general interest herein alleged is based on the fact that a group in total of 800 prominent citizens of various creeds and creeds, including religious and civic leaders, Public School teachers and College and High School students are named defendants herein.

10. That the cases herein are unique in that they do not fall within such type of cases as are generally prosecuted by affidavit and information in the Criminal Court of the City of New York. This is so because in these cases the real issue is a moral attempt in utilizing the Penal Law to promulgate certain moral principles in an area touching basic Constitutional rights.

11. That in practical consequence of convictions in the [redacted] charging infractions, would be as severe and decisive as if such convictions were for a Felony. Many of the defendants hold such positions or practice such professions as render them liable to dismissal and/or prescription by their, professional societies if convicted. The substantial property rights of these defendants are clearly manifest, and great loss would be sustained by the community, the respective defendants and their families upon conviction.

[redacted] In addition to everything that has been [redacted] reason stands out in favor of the [redacted] cases to the Grand Jury. That your [redacted] that [redacted] people have been [redacted] above cases. The building trades unions the construction contractors and the builders, the state and city of New York are daily carrying on illegal acts in violation of Sections 514, 700 and 701 of the Penal Law by discriminating against Negroes at the Downstate Medical situs. See also Section 220B, Labor Law; and Sections 290 and 296 of the Executive Law. If the cases at bar are prosecuted by indictment, the Grand Jury will have the opportunity to investigate the truly unlawful acts being perpetrated at the Downstate Medical Center which are violative of the statutes above-indicated.

13. Attached hereto and made a part hereof and marked Exhibit I is a copy of an affidavit submitted in another action by Herbert Hill, Labor Secretary of the National Association for the Advancement of Colored People, setting forth in great detail the facts constituting discriminatory activities mentioned herein.

14. In a matter similar if not identical with the matter now before this Court, Mr. Justice Conroy in his decision in effect called the demonstrators patriots and further indicated that these actions were the foundation fibers of America - and rightly so.

WHEREFORE, your deponent respectfully requests an Order pursuant to Section 32 of the New York City Criminal Courts Act, certifying that it is reasonable that the charges aforesaid be prosecuted by indictment, and for such other and further relief as may be deemed just and proper

RAY H. WILLIAMS

Sworn to before me this
27th day of February, 1964.

NETTIE LEVY
COMMISSIONER OF DEEDS
CITY OF NEW YORK 3-483
Certificate filed in New York County
Commission expires April 6, 1965

EXHIBIT

A F F I D A V I T

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

[redacted], being duly sworn, deposes and says:

I am Secretary for the National Association for [redacted] Colored People, 20 West 40th Street, New York, New York, and have held this post for fourteen years. In this capacity, I am responsible for the conduct of a nation-[redacted] litigation [redacted] the training and employment of Negro workers involving federal agencies, state and municipal fair employment practices commissions, industrial management and organized labor. I had been active for many years in the trade union movement and was engaged in organizational work for the United Steelworkers of America. I have lectured extensively on race and social problems in the United States, England and Europe and, in 1958, served as a Special Consultant to the Second United Nations Conference on the Eradication of Discrimination held at Geneva, Switzerland. I have written articles on race and social problems for The New Statesman and Nation, contributor, The Journal of Negro

Education, The New Leader, Dissent, Midstream, Journal of Intergroup Relations, Phylon, The Crisis and other publications, and am co-author of "The Citizens Guide to Desegregation: A Study of Social and Legal Change in American Life." I directed an extensive study undertaken by the staff of the National Association for the Advancement of Colored People into the question of Negro participation in apprenticeship training programs, and prepared "The Negro Wage-Earner and Apprenticeship Training Programs," an NAACP publication issued in 1959 which set forth the results of this study.

2. Contracts for work on public projects in the City of New York, whether state, city or joint projects, are given to contractors who employ union labor and who have entered into collective bargaining agreements with the major unions having jurisdiction over such work in the City of New York. These unions are AFL-CIO unions and are affiliated with the New York City Building and Construction Trades Council.

3. The building trades unions exercise virtually complete control over entry into jobs in the skilled trades in the building and construction industry in the City of New York. In most crafts, the contractors do no open hiring at all. They are required, by the terms of the collective bargaining agreements they have entered into with the building trade unions, to obtain all personnel through the unions. The contractor merely contacts the unions, states his needs, and men are dispatched to the job.

through the union hiring halls. The unions thereby exercise direct control over job opportunities in the skilled trades.

4. Only journeymen who are members of the local union having jurisdiction over jobs in the respective crafts, or who have been issued work permits by such local unions, can find employment on state or city construction projects in the City of New York and, similarly, only those apprentices who are enrolled in apprenticeship training programs effectively controlled by these unions can be employed on public construction projects.

5. Since the unions control the apprenticeship training programs and entry thereto, and since only those who are admitted into these apprenticeship training programs have any opportunity to learn the skills necessary to the attainment of journeyman status (a prerequisite to membership in the unions), the unions further determine who may and who may not qualify for employment on public construction projects in the City of New York.

6. Negroes are systematically excluded from both apprenticeship training programs and from membership in most building trades unions in the City of New York. At one time, some of these unions had constitutional or by-laws provisions excluding Negroes from membership, while such constitutional or by-laws provisions excluding Negroes from membership have been removed under pressure, tacit understandings serve equally effective to exclude Negroes from apprenticeship training programs and from membership.

7. Sponsorship requirements, whereby an applicant for

an apprenticeship training program or for membership must be sponsored by one or more members of the local union involved before the application is even considered, is one device by which Negroes are excluded. Among other devices employed to discourage applicants for apprenticeship training programs in particular are long recitations of the "hazards of the trade," manipulation of waiting lists both in number and in order, the refusal to process applications on a non-discriminatory basis and the outright refusal of applications.

8. The effect of the long-standing policy of systematic and discriminatory exclusion of Negroes from apprenticeship training programs and from membership is that most building trades unions in the skilled trades have either no Negro members or only token numbers. For example, Local 28, of the International Association of Sheet Metal Workers (AFL-CIO), has no Negroes among its 3,300 members, Local 1, of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, has six (6) Negroes among its 2,600 members, Local 2, of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, has 16 Negroes among its 4,700 members; Local 46, of The Wood, Wire, and Metal Lathers International Union (AFL-CIO), has 2 Negroes among its 1,700 members; Local 40, of the International Association of Bridge, Structural and Ornamental Ironworkers (AFL-CIO), has no Negroes among its 1,020 members; Local 361, of the International Association of Bridge, Structural and Ornamental Ironworkers

(AFL-CIO), has no Negro members among its approximately 750 [redacted] International Union of Elevator Con-[redacted] among its 2,300 members and [redacted] Association of Journeymen [redacted] Fitting Industry of the United States and Canada, has no Negroes among its 4,000 [redacted]. The only few Negroes who are members of these unions [redacted] admitted only under pressure from organizations such as the NAACP and Urban League. It should be noted that with only one exception, the statistics given above were those provided by officers of the unions named and, if anything, they overstate the number of Negro members in their respective unions.

9. Local 28, of the International Association of Sheet Metal Workers (AFL-CIO), [redacted] Steamfitters Local 638, of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, which have no Negro members, have city-wide jurisdiction [redacted] Metal Lathers International Union (AFL-CIO), which has only two (2) Negro members. Locals 60 and 361, of the International Association of Bridge, Structural and Ornamental Iron Workers (AFL-CIO), which have no Negro members, control all steamfitting work jobs in the City of New York. Locals 1 and [redacted] of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, which have a total membership of [redacted]

6,700, control all plumbers jobs in the city (except Staten Island), Local 1, of the International Union of Elevator Constructors (AFL-CIO), with only three(3) Negro members, has city-wide jurisdiction. All public construction projects in the City of New York, state or city, which requires plumbing work, structural iron work, sheet metal work, metallic lathing work, elevator construction work or ornamental iron work, have jobs controlled by the aforementioned unions, unions which discriminatorily exclude Negroes from membership and from their apprenticeship training programs.

[illegible] systematically and discriminatorily excluding Negroes from apprenticeship training programs and membership, many building trades unions in the City of New York which have jurisdiction over work in skilled trades artificially limit employment, rapidly shrinking the ranks of Negroes into [illegible] and journeyman ranks. Rather than expanding their membership and training programs to meet rising demand and [illegible] for skilled craftsmen in the City of New York, these unions [illegible] the job opportunities for Negro workers, [illegible] journeymen from cities throughout the country to work the key jobs of work on construction jobs in the city. These journeymen are chosen with friends in the local union controlling jobs in the various crafts and constitute a significant number of the more favored in the building and construction industry in the city of New York, swelling in the many occasions virtually all journeymen from out-of-town who are [illegible] to work in the City of New York are white.

[redacted] this policy, the Unions controlling jobs in [redacted] usually limit membership and restrict entry into apprenticeship training programs to a small in-group consisting of relatives and close friends of current members insofar as only such persons can find sponsors among current members. [redacted] are almost no Negro members or only very small token [redacted] such locals controlling jobs in the skilled trades, this effectively prevents Negroes from entering apprenticeship training programs or being admitted into membership and perpetuates the historical pattern of discriminatory exclusion.

[redacted] vocational schools in the City of New York [redacted] trained to skilled trades in the building [redacted] among these courses in plumbing and [redacted] of the schools providing such courses [redacted] of non-white students, far above the proportion of non-whites to white in the population of the city in general. There are six (6) vocational schools that have sheet metal work courses. [redacted] vocational, has a student body [redacted] vocational also has a course [redacted] of the International Association of [redacted] (UA-AFL-CIO), has no Negroes among its 2,300 members and none in its apprenticeship training program. Locals [redacted] of the Plumbing and Pipe Fitting Industry of the United States and Canada, have only 22 Negroes in their combined membership of 1,700 and Steamfitters Local 638, of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, has no Negroes among its 4,000 members who work in construction, while training in

vocational school is by no means a substitute for a regular apprenticeship training program, the fact that such a high proportion of non-white students are interested in and take courses directly related to skilled trades in the building and construction industry and yet are unable to gain entry to apprenticeship training programs controlled by the local unions involved, clearly points up the discriminatory policy of these unions.

13. Attempts to open up the apprenticeship training programs so that qualified Negro youth can be admitted on a non-discriminatory basis have been rebuffed by most unions controlling jobs in the skilled trades in the building and construction industry, particularly those unions which discriminate most blatantly. The International Office of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, for example, is on public record that it will not comply with the U.S. Department of Labor directive, dated July 17, 1963, which set forth procedures to insure "Non-Discrimination in Apprenticeship and Training Policy." Leaders of the New York City Building and Construction Trades Council, called to a meeting in Washington on August 7, 1963, by Secretary of Labor Wirtz to discuss ways and means of eliminating discrimination in apprenticeship programs controlled by unions in the building and construction industry in the City of New York, similarly stated that they would not comply with the directive of July 17th.

14. The facts concerning discriminatory exclusion of

Negroes from apprenticeship training programs and membership in building trade unions having jurisdiction over jobs in the skilled trades in the building and construction industry in the City of New York were long ago established and have been confirmed time and time again. In 1960, the State Commission Against Discrimination issued a report entitled "Apprentices, Skilled Craftsmen and the Negro." An analysis, which clearly showed that, by one device or another, Negroes are effectively excluded from membership and from apprenticeship training programs controlled by building trades unions in New York. The report stated that although unions such as the International Association of Sheet Metal Workers Union removed constitutional or by-laws provisions excluding Negroes from lily-white locals in 1948 under pressure from the State Commission Against Discrimination, "no gains or none of significance have been made by Negroes in the apprenticeship programs conducted or effectively controlled by these unions." [illegible] 1963, the New York State Advisory Committee [illegible] Commission on Civil Rights issued a report entitled "[illegible] a study of the policies and practices of [illegible] in the City of New York regarding Negroes. [illegible] are denied access to employment in most of the building trades in New York City," and that "retention of present practices in admission to apprenticeship programs will mean that Negroes can expect no more than token participation in most of the building trades in the future." (P. 1).

65. The studies and reports mentioned above, as well

as many other extensive studies into the problem of discriminatory exclusion of Negroes from apprenticeship training programs and from membership in unions controlling jobs in the skilled trades in the building and construction industry, fully support the statement made by the Executive Secretary of the National Association for the Advancement of Colored People, Roy Wilkins, in his introduction to "The Negro Wage-Earner and Apprenticeship Training Programs." Mr. Wilkins said: "The analysis indicates that given a continuation of present rates of advance, it will take Negroes 138 years, or until the year 2094, to secure equal participation in skilled-craft training and employment. Surely this condition will not be accepted by Negroes and we hope it will not be countenanced by others." (P. III).

/s/ Herbert Hill

Sworn and subscribed before me
this 23rd day of September, 1963.

Notary Public

Primrose L. Hutcheson
Notary Public, State of New York
No. 03-1908575
Qualified in Bronx County
Commission Expires March 30, 1965

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

MILTON A. GALAMISON, et al,
WILLIAM DEUTSCH, et al,

Petitioners-Appellants,

-against-

CITY OF NEW YORK,

Respondent-Appellee.

- x

Nos. 29166-72

Nos. 29173-5

The attached copy of the recent opinion of the United States Court of Appeals for the Fourth Circuit is submitted pursuant to this Court's instructions at the oral argument herein as a replacement for the illegible copy then furnished to the Court. Copies of this opinion have been forwarded by United States Mail, prepaid first-class, this date, to opposing counsel.

October 9, 1964

JOHN E. SILVERBERG,
15 Park Row,
New York, N.Y.

CARL RACHLIN,
165 West 46th Street,
New York, N.Y.

Of Counsel:

KUNSTLER KUNSTLER & KINOY,
511 Fifth Avenue,
New York 17, N.Y.

No. 9212.

Dolores J. Page and Margaret P. Dillard,
Appellants,

versus

Chief Eugene McCain, et al.,
Appellees.

ON PETITION FOR REHEARING

(Filed September 29, 1964.)

PER CURIAM:

In cases Nos. 9080 and 9082, we held that the District Court's remand of criminal cases which had been removed to it from the state court was not reviewable under the provisions of 28 U.S.C.A. § 1447(d). We did not consider the effect of § 901 of the Civil Rights Act of 1964 authorizing appellate review of remand orders in civil rights cases. The Civil Rights Act of 1964 had not been enacted when the majority opinion was circulated, but it was enacted

prior to the entry of judgment and the announcement and publication of the opinions.

A petition for rehearing has suggested that, under the general principle that an appellate court should govern itself by changes in the law occurring after entry of the judgment under review, the disposition of the appeals in Nos. 9080 and 9082 should have been controlled by the newly enacted § 901 of the Civil Rights Act of 1964. The suggestion requires our further consideration and the petition for rehearing will be granted in Nos. 9080 and 9082.

The appellees will be asked to file a brief on the merits in those two cases, with leave, if they wish, to discuss the applicability of § 901 of the Civil Rights Act of 1964 under the circumstances of this case, while the appellants shall have leave to supplement the briefs and petitions previously filed by them in these two cases to the extent they deem appropriate.

The petition for rehearing insofar as it is addressed to the other cases determined by this Court's judgment will be denied.

Petition granted in cases Nos. 9080 and 9082;

Petition denied in cases Nos. 9081, 9083, 9084, 9149, 9150 and 9212.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 156-165—September Term, 1964.

(Argued October 2, 1964 Decided January 26, 1965.)

Docket Nos. 29166-29175

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

—v.—

MILTON A. GALAMISON, *et al.*,

Appellants.

Before:

FRIENDLY, KAUFMAN and MARSHALL,

Circuit Judges.

Appeals from orders of the District Courts for the Eastern District of New York, George Rosling, *Judge,* and the Southern District of New York, John M. Cannella, *Judge,* remanding state criminal proceedings against appellants to the New York courts. Affirmed.

WILLIAM M. KUNSTLER (Kunstler, Kunstler & Kinoy, New York, N. Y.), and John E. Silverberg, New York, N. Y. (Carl Rachlin, on brief), *for Appellants.*

HARVEY B. EHRLICH (Frank D. O'Connor, District Attorney, Queens County, New York; Louis J. Lefkowitz, Attorney General, State of New York, Mortimer Sattler, Assistant Attorney General, of Counsel), FRANK S. HOGAN, District Attorney, New York County (Richard H. Kuh, John A. K. Bradley, Assistant District Attorneys, of Counsel), and ISIDORE DOLLINGER, District Attorney, Bronx County (Irving Anolik, Assistant District Attorney, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge*:

We have here appeals concerning some sixty persons from orders of the District Courts for the Eastern and Southern Districts of New York, remanding to the New York courts criminal proceedings sought to be removed pursuant to 28 U. S. C. §1443,[1] a statute which goes back to the Civil Rights Act of 1866, 14 Stat. 27. The appeals are the first to be taken to this court as a result of §901 of the Civil Rights Act of 1964, Pub. L. 88-352, which limited the general prohibition of review of remand orders

1 "§1443. Civil rights cases.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

"on appeal or otherwise," 28 U. S. C. §1447(d),[2] by adding a clause "except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

In the light of the rule, established before the prohibition of direct review, that an order of remand was not a final judgment subject to appeal under what is now 28 U. S. C. §1291, but could be tested only by mandamus, *Chicago & Alton R.R.* v. *Wiswall,* 90 U. S. (23 Wall.) 507 (1875), and the failure of the framers of the Civil Rights Act of 1964 to amend 28 U. S. C. §1292(a) to add remand orders under 28 U. S. C. §1443 as a new category of appealable interlocutory orders, it could be argued with some force that review here would lie only through mandamus. If necessary, despite some prior decisions of this court discussed in *United States* v. *O'Connor,* 291 F. 2d 520, 524 (2 Cir. 1961), we would be prepared to treat the instant appeals as petitions for such writs. However, in view of the Congressional purpose as revealed in the legislative history, H. Rep. No. 914, 88th Cong. 2d Sess. (1963); 110 Cong. Rec. 6739 (daily ed. April 6, 1964) (remarks of Senator Dodd), and the cumbersome nature of mandamus, we shall construe the 1964 statute, despite its inartistic drafting in this respect, as sufficiently revealing an intention to authorize appeals from orders of remand under 28 U. S. C. §1443.

Galamison and nearly fifty other appellants were named as defendants in prosecutions in Queens County, New York, for various acts which disrupted highway and subway traffic to the New York World's Fair in order to publicize their grievances over what Galamison's removal petition characterizes as "the denial of equal protection of the laws to Negroes in the City, State and Nation with reference to

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2 The prohibition dates from the Act of March 3, 1887, §1, 24 Stat. 552, as construed in *In re Pennsylvania Co.,* 137 U. S. 451 (1890).

housing, education, employment, police action and other areas of local and national life too numerous to mention." Two appellants were arrested in Bronx County after passing out leaflets at a public school urging a protest against lack of integration. Eight more were being prosecuted in New York County for staging a sit-in at City Hall in the course of a protest on the same subject. All filed petitions removing the criminal cases against them to the federal courts.[3] The state having moved to remand, Judge Rosling in the Eastern District of New York, dealing with the Queens County cases, and Judge Cannella in the Southern District of New York, dealing with the Bronx and New York County cases, granted the motions without conducting the evidentiary hearings which appellants had sought primarily, if not exclusively, with reference to their claims under §1443(1). Appeals having been taken, judges of this court stayed the remand orders to enable us to consider the important and largely novel questions presented.

At the argument before us, counsel for the appellants expressly disclaimed reliance on the first clause of §1443, and staked the cases entirely on the second. The district attorneys asked us to disregard informalities in the removal petitions and dispose of appellants' claim under §1443(2) on the merits—a proposal which appellants applauded. Reading the petitions in the spirit which the State has invited and in the light of appellants' thorough

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3 For reasons that escape us, the petitions were captioned as proceedings by the various petitioners against the City of New York. A proceeding removed to a federal court remains what it was in the state court, in this instance criminal actions by the State of New York against the defendants. We have revised the caption so as to reflect the true nature of the proceedings.

The New York statutes alleged to have been violated were Penal Law §§244 (assault third), 722 (disorderly conduct), 722-b (loitering at school building), 1532 (maintaining a nuisance), 1851 (resisting an officer), 1990 (obstructing railway cars), 2036 (unlawful intrusion), and 2092 (unlawful assembly), and Education Law §3212 (inducing truancy).

briefs, we construe them as asserting that appellants' acts of protest and resistance were "under color of authority" of one or more of three "law[s] providing for equal rights" —the guarantees of free speech and petition embodied in the due process clause of the Fourteenth Amendment, the equal protection clause of that Amendment, and statutory protection of rights conferred by the Constitution, notably 42 U. S. C. §§1981 and 1983.[4] Alternatively the petitions suggest that appellants' refusal to obey police commands was "on the ground that it would be inconsistent with" the same three sets of laws.

We pause at this point for a word concerning our dissenting brother's position that the petitions are so defective that we ought simply to vacate all the orders of remand and have everyone start over again. While the petitions may not have been drawn with the expertness desired and might well have been insufficient properly to raise the question of removal under §1443(1), there is not and never has been any such difficulty in discerning what is here at issue as the dissent suggests. The Queens County cases concern widely publicized mass demonstrations in public places—the streets and the subway. The New York County

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4 "1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

housing, education, employment, police action and other areas of local and national life too numerous to mention." Two appellants were arrested in Bronx County after passing out leaflets at a public school urging a protest against lack of integration. Eight more were being prosecuted in New York County for staging a sit-in at City Hall in the course of a protest on the same subject. All filed petitions removing the criminal cases against them to the federal courts.[3] The state having moved to remand, Judge Rosling in the Eastern District of New York, dealing with the Queens County cases, and Judge Cannella in the Southern District of New York, dealing with the Bronx and New York County cases, granted the motions without conducting the evidentiary hearings which appellants had sought primarily, if not exclusively, with reference to their claims under §1443(1). Appeals having been taken, judges of this court stayed the remand orders to enable us to consider the important and largely novel questions presented.

At the argument before us, counsel for the appellants expressly disclaimed reliance on the first clause of §1443, and staked the cases entirely on the second. The district attorneys asked us to disregard informalities in the removal petitions and dispose of appellants' claim under §1443(2) on the merits—a proposal which appellants applauded. Reading the petitions in the spirit which the State has invited and in the light of appellants' thorough

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3 For reasons that escape us, the petitions were captioned as proceedings by the various petitioners against the City of New York. A proceeding removed to a federal court remains what it was in the state court, in this instance criminal actions by the State of New York against the defendants. We have revised the caption so as to reflect the true nature of the proceedings.

The New York statutes alleged to have been violated were Penal Law §§244 (assault third), 722 (disorderly conduct), 722-b (loitering at school building), 1532 (maintaining a nuisance), 1851 (resisting an officer), 1990 (obstructing railway cars), 2036 (unlawful intrusion), and 2092 (unlawful assembly), and Education Law §3212 (inducing truancy).

briefs, we construe them as asserting that appellants' acts of protest and resistance were "under color of authority" of one or more of three "law[s] providing for equal rights" —the guarantees of free speech and petition embodied in the due process clause of the Fourteenth Amendment, the equal protection clause of that Amendment, and statutory protection of rights conferred by the Constitution, notably 42 U. S. C. §§1981 and 1983.[4] Alternatively the petitions suggest that appellants' refusal to obey police commands was "on the ground that it would be inconsistent with" the same three sets of laws.

We pause at this point for a word concerning our dissenting brother's position that the petitions are so defective that we ought simply to vacate all the orders of remand and have everyone start over again. While the petitions may not have been drawn with the expertness desired and might well have been insufficient properly to raise the question of removal under §1443(1), there is not and never has been any such difficulty in discerning what is here at issue as the dissent suggests. The Queens County cases concern widely publicized mass demonstrations in public places—the streets and the subway. The New York County

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4 "1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

cases concern demonstrations in City Hall. No one asserts that Negroes in New York City are subjected to unequal treatment in any of these places or that the demonstrations were intended to remove discrimination there; the protests were directed at alleged unequal treatment generally "in the City, State and Nation." This leaves the cases from Bronx County. We shall assume that the school at which these two appellants were distributing leaflets was in their view a segregated one; on the other hand, there is not a word in the petitions, nor has there been the slightest suggestion from counsel, that the appellants were or had children in that school.

It would indeed be pleasant if we could conscientiously avoid decision here. The interpretative problems are difficult, due to the age of the statute, the lack of decisions thereunder and the mangling which it has undergone; it is unfortunate that, in subjecting remands under §1443 to review, the draftsmen of the Civil Rights Act of 1964, understandably preoccupied with more pressing issues, did not attempt to clarify what that venerable statute meant. The pain of decision is exacerbated when one choice may somewhat impair expectations entertained by persons of good will whose objectives we admire, and the other, in our view, would do violence to institutions and relations we hold equally dear, the continued efficient functioning of which has far greater long-run importance to minorities than the special relief here sought. But, as Judge Learned Hand so frequently reminded us, often in more colorful language, it is "a judge's duty to decide, not to debate," The Spirit of Liberty 100 (1959 paperback ed.)—and here to construe, not to suggest a variety of possible constructions without coming to rest on any one. Apart from desiderata as to the instant prosecutions, the district courts in this circuit require guidance as to other cases that have been accumulating while we have had these under advisement. And

it will be more helpful to the Supreme Court and to the Congress—and it is well to remember it is a statute we are expounding—for us to expose the problems raised by the removal petitions here before us and state what we consider their proper solution under existing law, rather than postpone the issue by remanding these cases and having them back six months hence with the issues no different then than now.

We turn initially to the history of the statute. Section 1443 stems from §3 of the first Civil Rights Act, 14 Stat. 27 (1866), quite obviously enacted under the power conferred by the recently adopted Thirteenth Amendment and prior to the adoption of the Fourteenth. Section 1 of the Act declared that, with exceptions not here relevant, "all persons born in the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other . . ." Section 2 made it a crime for any person "under color of any law, statute, ordinance, regulation, or custom" to deprive any person of any right secured by the Act. There follows the removal provision, §3, the first sentence of which we quote in the margin.[5]

5 *"And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any

The Act of May 31, 1870, 16 Stat. 140, reenacted the Civil Rights Act of 1866, safeguarded the equal rights of citizens to vote, and defined, among others, the crime of conspiring to injure a citizen in the exercise of rights "granted or secured to him by the Constitution or laws of the United States," now 18 U. S. C. §241. Although the new act had added a major new statutory right and expanded original federal jurisdiction in several respects, the 1866 removal provision was not broadened significantly. An amendatory Act of Feb. 28, 1871, 16 Stat. 433, created a scheme for supervising federal elections and made certain provisions for removal in voting rights cases.

The first important change of language in the removal section came in the Revised Statutes of 1875 and 1878, the former of which constituted "positive law." [6] In codi-

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suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof."

The provision was rather clearly modeled on §5 of the Habeas Corpus Act of 1863, 12 Stat. 756, which provided:

"*And be it further enacted,* That if any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, . . . " then the defendant may, after compliance with certain procedural requirements, remove the action to a federal court.

6 The first edition of the Revised Statutes was authorized in 1866, completed in final form in 1873, enacted in 1874, and published as

fying the laws these revisions distributed what had become the considerable bundle of provisions concerning civil rights among four titles. Title XXIV, entitled "Civil Rights," included the former §1 of the Civil Rights Act of 1866, divided into two sections, 1977 and 1978, which have been carried forward as 42 U. S. C. §§1981 and 1982. The civil liability which §1 of the Act to Enforce the Provisions of the Fourteenth Amendment, 17 Stat. 13 (1871), had created in respect of any person who, under color of any state law, subjected another person "to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States," was broadened to include "the Constitution and laws"; this became §1979, now 42 U. S. C. §1983. Title XXVI, The Elective Franchise, comprised all the rights, rules and civil liabilities related to voting. Criminal provisions concerning civil rights and voting appeared in Chapter 7 of Title LXX, "Crimes." The jurisdictional provisions, both for original jurisdiction and on removal, were placed in Chapter 7 of Title XIII, "The Judiciary." The removal provision, §3 of the Civil Rights Act, became §641, reading as follows:

> "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military,

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18 Statutes at Large (part I) in 1875. See Dwan & Feidler, The Federal Statutes—Their History and Use, 22 Minn. L. Rev. 1008 (1938). Adopting one of several possible usages, we label the first edition as the "Revised Statutes of 1875" and, for simplicity, refer to its compilers as the Revisers of 1875.

or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending."

Section 641 was carried forward into §31 of the Judicial Code of 1911, 36 Stat. 1096, without any real change. In contrast, the 1948 codification greatly altered the language. Procedural details were split off into other sections; the structure was rearranged by putting the verb "may be removed" before both clauses instead of after both and by separating the clauses with numbers; the words "any officer, civil or military, or other person" in the second clause were dropped, with nothing supplied to replace them; "arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority" was contracted to "any act under color of authority"; and the "as aforesaid" after "any law providing for equal rights" in clause (2) was eliminated. At the same time an important change, obviously of substance and clearly so indicated in the Reviser's Note, was made in the removal provision, §1442, dealing with federal officers. The corresponding provision in Rev. Stat. §643, carried forward in §33 of the 1911 Code, 36 Stat. 1097, had covered civil suits or criminal proceedings against officers or other persons acting under the revenue laws.[7] Section 1442(a)(1) of the 1948 Code

7 The emphasis on revenue officers goes back to statutes enacted to meet New England's resistance to the War of 1812, Act of Feb. 14,

expanded this coverage to allow removal by "any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any rights, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

I. This history assists us in disposing of the State's first argument in support of remand, namely, that the two clauses of §1443 must be read together and the conditions of both satisfied. The argument derives from the action of the 1948 Reviser in eliminating the venerable words "any officer, civil or military, or other person" and also the "or" which had always separated the two clauses, thus leaving clause (2) without any referent and arguably linking it to clause (1). But the State's textual argument is overborne by a multitude of other considerations. Until 1948 the two clauses were grammatically parallel and were always separated by an "or"; and the 1948 Congress could not have meant that an officer seeking to avail himself of the second clause, which often would have afforded his sole basis for removal, would also have to meet the tests of the first. An intention on the part of the 1948 Congress to collapse two independent grounds of removal, recognized for three-quarters of a century, into a single one, more limited than either, ought not be assumed unless compelled by the language or supported by legislative history. But there is no such history and the linguistic difficulties in reading the two clauses as alternatives are more grammatical than semantic —it is not really hard to see that Congress was driving at two things rather than at one; indeed, the difficulties in such

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1815, §8, 3 Stat. 198, and South Carolina's resistance to the tariff, Act of March 2, 1833, §3, 4 Stat. 633. Section 643 also covered other possibilities, notably officers and other persons acting under Title XXVI, the elective franchise—a provision omitted in 1911.

a reading are rather less formidable than those entailed in an attempt to read the second clause as limiting the first. The general scheme of the jurisdiction sections of the Judicial Code is that numbered clauses are alternatives, see, e.g., §§1332(a), 1333, 1343, 1442(a). We treat the omission of a referent in §1443(2) as an unwise attempt by the Reviser to achieve compactness; what referent should be supplied is a different question, discussed in Section III below.

II. We deal next with the State's argument that appellants' acts went beyond the proper bounds of the freedom of speech and petition that the Constitution guarantees. The short answer, when the argument is stated in this breadth, is that these are the very questions which, under appellants' construction of §1443(2), Congress meant to have decided in a federal trial; a defendant seeking removal under that section does not have to prove preliminarily that he will prevail. It is true that a particular case might go so far beyond any possible scope of the right relied on as to transcend the most expansive reading of §1443(2); it could not be seriously contended, for example, that assaulting a state official for delay on his part in achieving integration was protected by any provision of the Constitution. But the State has not shown that the appellants here fail on this ground.

III. We thus reach a more serious contention, namely, that §1443(2) covers only officers and those persons assisting them or acting in some way on behalf of government. To say that clause (2) contains no description of who may invoke it is not a sufficient answer; some referent must be supplied.

Appellants say that the original language of the Civil Rights Act, allowing "any officer . . . *or other person*" to remove, must also have permitted removal by persons

not acting officially, that is, persons merely exercising certain civil rights. This juxtaposition of "officer" and "other person" was carried forward into every revision from Rev. Stat. §641 onwards until 1948, and the 1948 revision surely did not mean to narrow removal. But, although *ejusdem generis,* relied on by the State to limit "or other person" to a quasi-official, is a dubious aid, see the opposing instances in Llewellyn, The Common Law Tradition: Deciding Appeals 526-27 (1960), there are extremely substantial arguments in support of the State's construction.

One begins with the troubling question why if "other person" in fact meant "any person," Congress did not simply repeat in the second or "authority" clause of §3 of the Act of 1866 and §641 of the Revised Statutes, these words which it had already used in the first or "denial" clause. Next, since the first clause was directed only toward freedmen's rights, symmetry would suggest that the second clause concerned only acts of enforcement. "Arrest or imprisonment, trespasses, or wrongs," were precisely the probable charges against enforcement officers and those assisting them; and a statute speaking of such acts "done or committed by virtue of or under color of authority derived from" specified laws reads far more readily on persons engaged in some sort of enforcement than on those whose rights were being enforced, as to whom words like "acts founded upon" would have been much more appropriate. The inclusion of "or other person" can readily be explained without going so far as appellants urge. In anticipation of massive local resistance Congress devoted §§4-10 of the Civil Rights Act of 1866 to provisions compelling and facilitating the arrest and prosecution of violators of §2, the criminal sanction for §1 rights. These sections authorized and required district attorneys to prosecute under §2, fined marshals who declined to serve warrants, authorized federal commissioners

to "appoint, in writing . . . any one or more suitable persons, from time to time" to serve warrants, empowered the persons so appointed "to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the . . . forces of the United States" as was needed, and made interference with warrant service a further federal crime. Although the "one or more suitable persons" might be deemed "officers," the bystanders and the posse comitatus were not, and were surely among those covered by "other person." The argument for a limited construction of "other person" in the "authority" clause is aided by the consideration that the 1866 Act conferred original jurisdiction only for the "denial" category. The freedmen would need that resource, whereas officers and persons acting under or in aid of them normally would not. Finally, the derivation of §3 of the 1866 Act from §5 of the Habeas Corpus Act of 1863, see fn. 5, argues against appellants' broad construction. The "any other person" in the 1863 act was someone who had been deputized by the President or by Congress to do something, not a person asserting his own rights. It is rather logical to assume that Congress had the same kind of "person" in mind when it used the same phrase in the Civil Rights Act of 1866 and repeated it in §641 of the Revised Statutes.

Appellants' counterargument as to the meaning of the Reconstruction legislation rests largely on the basis that when Congress wanted to limit a removal provision to officers and persons acting under or in aid of them, it knew how to say so. The first such act, 3 Stat. 198 (1815), had referred to "any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this act, or under color thereof, for anything done, or omitted to be done, as an officer of the customs, or for any thing done by

virtue of this act or under color thereof . . ."[8] And the very Congress that adopted the Civil Rights Act of 1866 provided for removal of any civil or criminal action "against any officer of the United States, appointed under or acting by authority of [certain prior revenue acts] . . . or against any person acting under or by authority of any such officer on account of any act done under color of his office, or against any person holding property or estate by title derived from any such officer, concerning such property or estate, and affecting the validity of [the revenue laws] . . ." 14 Stat. 171.

Moreover, appellants contend that even if the State were right as to the meaning of the Reconstruction legislation, a broadening change was effected in 1948 since, the Reviser's surgery having left clause (2) without a referent, the "any person" of clause (1) is a readier source than the words in predecessor statutes. This argument gains support from the condensation of the historic "for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid," language rather strongly suggesting enforcement activity, into the more neutral "for any act under color of authority derived from any law providing for equal rights." Force is added by the simultaneous broadening of §1442(a)(2) dealing with federal officers, which we have outlined above, a change which makes §1443(2) largely redundant if it is confined to officers and persons acting under them.

Against this is the point that the 1948 Reviser gave no indication that §1443 was being substantively changed; the Note to the section spoke only of changes in phraseology,

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8 On the other hand, the Act of March 2, 1833, §3, 4 Stat. 633, used "or other person" without any qualification, and it is hard to believe that this act contemplated broader removal.

and a Congress preoccupied with other matters doubtless took him at his word. The courts have had frequent occasion to become familiar with the penchant of the 1948 Reviser for making a "quite unnecessary change in phraseology, apparently motivated in part by a stylistic preference," Gilmore & Black, The Law of Admiralty 35 (1957), without adequately considering the consequences arguably incident to the alteration and consequently without informing Congress of its possible effect. In the case of the "saving to suitors" clause, 28 U. S. C. §1333(1), discussed in the cited text, the Supreme Court found that the words of 1789 were a better guide to current Congressional purpose than those of 1948. *Madruga* v. *Superior Court,* 346 U. S. 556, 560 & n. 12 (1954). And in *Fourco Glass Co.* v. *Transmirra Prods. Corp.,* 353 U. S. 222, 227 (1957), the Court gave effect to "statements made by several of the persons having importantly to do with the 1948 revision . . . that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed."

While it has seemed worthwhile to set forth these arguments and counterarguments in detail, we find it unnecessary in this case to decide between them. For the appeals fail on other grounds, although these are not unrelated to the point just discussed.

IV. We next consider whether appellants' claims under the equal protection clause of the Fourteenth Amendment and its statutory precursor, 42 U. S. C. §1981, meet the "color of authority" or inconsistency requirements of §1443(2).

We begin by returning to the text we must construe. We have agreed with appellants that §1443(2) affords a ground for removal separate from §1443(1), and we are henceforth assuming, *arguendo,* that §1443(2) is not lim-

ited to officers or persons acting at their instance or on their behalf. It is undisputed, as the textual history demonstrates, that the laws referred to in the two clauses are the same, despite the more abbreviated language of the second. Yet a person relying on "a right under any law providing for the equal civil rights of citizens of the United States" may remove only if he "is denied or cannot enforce" that right in the state courts, whereas a person whose act is "under color of authority derived from" such a law may remove without any such limitation. It necessarily follows that "under color of authority derived from" in §1443(2) has a narrower meaning than "a right under" in §1443(1), since otherwise, in almost all cases covered by the first clause, which clearly covers deprivations of substantive rights and not merely procedural inequalities, the requirement of showing denial or inability to enforce would be avoided by resort to the second.

We gain a valuable insight into the meaning of "color of authority" if we reflect on the cases at which §1443(2) was primarily aimed and to which it indubitably applies—acts of officers or quasi-officers. The officer granted removal under §3 of the Civil Rights Act of 1866 and its predecessor, §5 of the Habeas Corpus Act of 1863, would not have been relying on a general constitutional guarantee but on a specific statute or order telling him to act. Cf. *Hodgson* v. *Millward,* 12 Fed. Cas. 568 (No. 6) (C. C. Pa. 1863), approved in *Braun* v. *Sauerwein,* 77 U. S. (10 Wall.) 218, 224 (1869).[9] A private person claiming the benefit of §1443(2) can stand no better; he must point to some law that directs or encourages him to act in a certain manner, not merely

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9 *Cunningham* v. *Neagle,* 135 U. S. 1 (1890), cited in the dissent, did not arise under a statute using the phrase "color of authority." However, the specific direction of the Attorney General to Neagle, 135 U. S. at 48, is a good example of what would clearly constitute "color of authority."

to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him.

Unwillingness to recognize this lies at the basis of our brother's dissent. It may be true enough that in common usage and understanding a person would be thought to have "color of authority"—although this is not exactly the ordinary discourse of laymen—to do any act for which he can successfully defend or for interference with which he can recover damages or ask the government to prosecute. But the issue is not the usage and understanding of ordinary words but the meaning of technical words in the particular context in which Congress used them in the two clauses of §3 of the Civil Rights Act of 1866 as this has been carried forward into 28 U. S. C. §1443. "If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words . . ." *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 379 (1959). A Court much closer to the Reconstruction legislation than we are, *Bigelow* v. *Forrest*, 76 U. S. (9 Wall.) 339, 348-49 (1869), applying the removal provision of the Habeas Corpus Act of 1863, see fn. 5, decided squarely that even when there was a specific statute or presidential order, not every act deriving its foundation therefrom was "under color of authority" of the statute or order for removal purposes.

Our problem as to the equal protection clause and 42 U. S. C. §1981 is thus not whether these are laws providing for equal rights, as they clearly are, but whether they confer "color of authority," in the sense of §1443(2), to perform the acts that are the subject of the state prosecution. We find ourselves unable to give an affirmative answer. Although alleged denial of equal protection in schools and other respects afforded the motivation and was the subject

of appellants' acts, neither the equal protection clause nor §1981 confers "color of authority" to perform acts which a state alleges to be in violation of laws of general application intended to preserve the peace from disturbance by anyone. The constitutional provision and the statute are addressed to preventing inequality in the treatment of conduct, and to that great purpose alone. They give no constitutional defense, let alone "authority," for disregard of laws providing for the equal punishment of disturbers of the peace simply because the disturbances were in the course of protests over alleged denial of equality in schools, housing or economic opportunity—any more than the Second Amendment bestows "authority" to disturb the peace in the course of a protest over an alleged denial of the right to keep arms or the Fourth Amendment does so with respect to a protest over police methods. A different case from any here before us would be presented if the act complained of in the state suit was performed in the defendant's exercise of an equal right, such as the right to equal accommodations under §201 of the Civil Rights Act of 1964, which Congress has singled out for federal protection. In such a case it could be contended that Congress "authorized" self-help to enforce such a specifically granted right,[10]

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10 In *Hamm* v. *City of Rock Hill*, —— U. S. —— (1964), the majority said that "the language of §203(c) supports a conclusion that nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution, for the statute speaks of exercising . . . a 'right or privilege' secured by its earlier provisions." But the statement of Mr. Justice Black, dissenting: "I do not understand from what the Court says that it interprets those provisions of the Civil Rights Act [of 1964] which give a right to be served without discrimination in an establishment which the Act covers as also authorizing persons who are unlawfully refused service a 'right' to take the law into their own hands by sitting down and occupying the premises for as long as they choose to stay," —— U. S. ——, creates doubt whether the majority's statement goes as far as the instant dissent implies.

Considerations similar to those stated in the text with respect to public accommodations, dealt with in Title II of the Civil Rights Act

and that the same principle would include a protest by the aggrieved person at a segregated place of accommodation on the theory that the greater includes the less. That would be altogether different from saying that other protests over lack of equal treatment, such as those at issue on these appeals, derive "color of authority" from the equal protection clause or equal rights statutes; the relevant provision here is the First Amendment as incorporated in the due process clause of the Fourteenth, see *Cox* v. *Louisiana*, —— U. S. —— (1965), and we will later discuss appellants' claims in that regard. Similarly, submission to the orders of law officers to desist from conduct forbidden by general state penal laws is not "inconsistent" with the equal protection clause or with §1981 simply because the conduct was a protest over lack of equal protection; neither the constitutional provision nor the statute directs anyone to resist.[11]

Appellants do not urge that New York has administered its penal laws in a discriminatory manner, so that conduct which the statutes forbid on their face would nevertheless be tolerated if carried on by a different group or for a dif-

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of 1964, might apply to the cases, put in the dissent, of a Negro who used self-help to register at a state university or who picketed in protest over a refusal, since, as our brother persuasively argues, Congress would have included an affirmation respecting public education in Title IV similar to that in §201(a) as to public accommodations if it had considered this necessary. But even if such cases should ultimately be held within §1443(2)—an issue on which we express no opinion, such a construction would not go beyond protests by those, or parents of those, attending or seeking to attend the particular school where the protest took place. None of the petitions here save the two Bronx County cases concerned protests at a school, and there is nothing to suggest that either of these persons was a child or the parent of a child at that school.

11 History makes plain that the "refusal" language had a very limited purpose. The reason assigned for insertion in the 1866 Act was that it was "to enable State officers, who shall refuse to enforce State laws discriminating in reference to these rights on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws." Cong. Globe, 39th Cong., 1st Sess. 1366 (1866).

ferent cause, see *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953), and they have made no suggestion that they wished to or properly could amend the petitions to assert this. Even if this had been plausibly asserted, it would still do some violence to the structure of §1443, as we have analyzed this, to say that the equal protection clause or 42 U. S. C. §1981 gives "color of authority" to perform an act, forbidden by nondiscriminatory legislation, which the state can constitutionally punish if only it punishes all persons doing acts of the same kind, and thus afford basis for removal under §1443(2) without the necessity of alleging denial or inability to enforce rights under these laws in the state courts, as would be required under §1443(1). Whatever the ultimate resolution of such questions may be, they are not before us on these appeals.

It is wholly consistent with the scheme of the removal statute to say that generalized guarantees of equal rights do not afford color of authority under the second clause of §1443. Such guarantees are within the first clause; even if the second clause should be held to include private citizens, it was drawn with primary reference to officers and persons acting at their instance; and we see no basis for the dissent's suggestion that our construction would frequently make it unavailable even to them.

V. Appellants' contentions based on statutes such as 42 U. S. C. §§1983 and 1985 and 18 U. S. C. §§241-42, creating civil claims or imposing criminal penalties for deprivation of constitutional rights, are unfounded for two reasons. As will be explained in section VI of this opinion, we do not believe that such statutes, coextensive with the whole reach of the Constitution, are laws providing for *equal* rights to which alone §1443 is addressed. And, as already shown, in order for a statute to provide "color of authority" to perform an act in the special context of §1443(2), it must

do more than protect conduct by giving remedies to the offended party. In that sense, all that is "authorized" by the statutes here under discussion is the award of damages or of criminal punishment. And it is in no way "inconsistent" with them for the victim to suffer the deprivation and then bring a civil suit or request the bringing of a criminal prosecution—the very purpose for which the statutes were designed.

VI. We thus turn to appellants' claims based on the prohibition, in the due process clause of the Fourteenth Amendment, of deprivation of "liberty," including the freedom of speech and petition guaranteed by the First Amendment. We hold that quite apart from the question of "color of authority," which would also require resolution in this context, the claims fail on the ground that these basic guarantees are not laws providing for "equal" civil rights to which §1443 is confined.

It is clear that rights of this sort were not in the contemplation of the framers of §3 of the Civil Rights Act of 1866. In that act, adopted prior to ratification of the Fourteenth Amendment, what has become §1443(2) permitted removal only "for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act" and the Freedmen's Bureau Acts. None of these statutes has any provision remotely relating to the general protection of freedom of speech or petition against state infringement, and there would hardly have been constitutional basis for so providing. After the ratification of the Fourteenth Amendment, Congress left the cross-reference unchanged until the passage of the Revised Statutes of 1875, and it added no additional removal provisions here significant in the interval.[12] But

12 We do not consider that the reference in the Act of April 20, 1871, §1, 17 Stat. 13, the antecedent of 42 U. S. C. §1983, authorizing "such proceeding to be prosecuted in the several district or circuit courts of

the Revised Statutes altered the cross-reference to "any law providing for equal [civil] rights." The issue posed is whether it was thereby intended that a claim that an act, challenged by a civil suit or criminal prosecution in a state court as a disturbance of the peace, was protected by the constitutional guarantee of liberty, would satisfy the requirement of showing that the act was "made or committed by virtue of or under color of authority derived from" a "law providing for equal [civil] rights," or that a similar claim with respect to any refusal to act so challenged was "on the ground that it would be inconsistent with such law." [13]

It would be strange if what was represented to be a mere codification accomplished so great a substantive

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the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts," under the provisions of the Civil Rights Act of 1866, "and the other remedial laws of the United States which are in their nature applicable in such cases," had the effect of making applicable the removal provisions of the 1866 act. "Such proceeding" is the private cause of action created by the 1871 act, and the cross-reference was rather to the portions of §3 dealing with original jurisdiction in civil causes and to §10 of the 1866 act. When Congress wished to expand the removal provisions, it used much more explicit language, as in the Act of Feb. 28, 1871, §16, 16 Stat. 438.

13 Apology for examination of this issue is scarcely needed; the dissent's reference to Mr. Justice Frankfurter's witty reference in *Greenwood* v. *United States*, 350 U. S. 366, 374 (1956), is misplaced. We are not at all seeking to overcome clear statutory language by resort to legislative materials. If the words are read in their "ordinary" meaning, they are limited to laws stated in terms of equality, both because that is what they say and because "equal" would otherwise be redundant. We examine the history to determine whether Congress meant something more than it said, and conclude it did not. It is passing strange to find Mr. Justice Frankfurter, very likely the strongest advocate of a historical approach to statutory construction ever to sit on the Supreme Court, see, e.g., *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 186 (1943); *United States* v. *Monia*, 317 U. S. 424, 432 (1943) (dissenting opinion); *Monroe* v. *Pape*, 365 U. S. 167, 211-46 (1961) (dissenting opinion), cited as opposing this.

change. The issue is not whether the Reconstruction Congress would have been capable of so drastic an alteration in judicial jurisdiction. The point rather is that it would be a flight of fancy to attribute, on the basis of a readily explicable change in wording, such an undisclosed purpose to a Congress which was aiming only to "revise, simplify, codify, arrange, and consolidate" existing statutes, and was so intent on avoiding substantive alterations that it designated a lawyer for the purpose of eradicating any such changes made by the codifying commission.[14] The need for the 1875 Revisers' altering the cross-reference in §3 of the Act of 1866 arose, as has been explained, from the very fact of codification and the consequent separation of the removal provisions from the rights and authorizations to which they referred. It is far more reasonable to conclude that the Revisers were thinking of laws stated in egalitarian terms, notably those that had been §1 of the Civil Rights Act and had become Rev. Stat. §§1977-78, now 42 U. S. C. §§1981-82, which is what they said, than that they meant to extend the right of removal to any person claiming the "liberty" protected by the newly adopted amendment, whose effect in that respect was, to say the least, then uncertain.

This view that no significant change with respect to removal was intended is confirmed by the Revisers' choice of the phrase best suited to convey the thought that only rights like those originally defined in §1 of the Civil Rights Act of 1866 were to continue to constitute a basis therefor —"any law providing for equal rights." The rights protected by §1 of the Civil Rights Act of 1866 were not absolutes but relatives; they were rights to equality—the limit

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14 See Act of June 27, 1866, 14 Stat. 74; Dwan and Feidler, *supra* note 6, 1013-14. It is said that the final revision passed the Senate in 40 minutes. See *id.* at 1015 n. 38.

of Congressional power when the legislation had to be rested solely on the Thirteenth Amendment. Appellants say that since the rights of freedom of speech and of petition are guaranteed to all and not just to some, they also are "equal" civil rights. But this truism, which is the strength of the argument, is also its weakness. What is so obvious to appellants must have been just as obvious to Congress, and "equal" would thus have been surplusage. That the Reconstruction Congress knew how to speak more broadly is evidenced by §1 of the Act of April 20, 1871, 17 Stat. 13, later Rev. Stat. §1979, and now 42 U. S. C. §1983, referring to the deprivation of "any rights, privileges or immunities" and particularly by Rev. Stat. §629 Sixteenth, now 28 U. S. C. §1343(3), giving the circuit courts original jurisdiction of suits for the deprivation under color of state authority "of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." Congress thus recognized the existence of a special body of laws providing for *equal* rights distinguishable from the universal protections of the Constitution. It was these *equal* rights laws, which had been referred to in the removal section as enacted in 1866 and were carried forward into the Revised Statutes, that furnished a basis for removal.

If there is thus no reason for thinking that Congress intended any significant substantive change in the cross-reference of the removal statute when it made the revision of 1875, there is equally little reason for believing that it had that purpose in the revisions of 1911 or of 1948. Because of the Supreme Court's restrictive interpretation of what is now §1443(1), see *infra,* and the prohibition of appellate review of orders of remand, the civil rights removal statute had been little used, and nothing suggests that the

1911 and 1948 Congresses were in any way concerned about this. We do not wish to be misunderstood as saying that the cross-reference today covers only those equal rights laws that existed in 1866. As Congress enacts new laws relating to equal rights, the cross-reference in §1443 takes them in; unquestionably the Civil Rights Act of 1964 is a law providing for equal rights within the removal statute. But that is very different from saying that every civil right conferred on all is so included.

On this point we receive also the welcome aid of authority. One of the claims in *Gibson* v. *Mississippi,* 162 U. S. 565, 586 (1896), where removal had been sought under the "denial" clause, was "that the statute under which the grand jury was organized was *ex post facto* when applied to the case of the present defendant . . ." The first Mr. Justice Harlan remarked, "This question does not depend upon section 641 of the Revised Statutes, but upon the clause of the Constitution forbidding a State to pass an *ex post facto* law," so that the claim was relevant only to the correctness of the state court judgment and not to that of the order of remand. Yet the right of protection against an *ex post facto* law is surely a civil right secured by the Constitution and, on appellants' theory, an "equal" civil right which was being denied by the state. Similarly, *Steele* v. *Superior Court of California,* 164 F. 2d 781, 782 (9 Cir. 1947), cert. denied, 333 U. S. 861 (1948), held that the practice of admitting evidence obtained by unlawful search and seizure then followed in California did not render a prosecution removable under the "denial" clause, since although there might be a denial of a civil right, there was no denial of *equal* civil rights, "such as a discrimination against a particular race."[15] Finally, *Douglas* v. *City of*

15 The importance of the *Steele* case lies in its recognition that "equal civil rights" are a narrower category than civil rights. A state procedural rule discriminating on racial grounds would, of course, furnish

Jeannette, 319 U. S. 157 (1943), lends strong inferential support to the conclusion that a claimed violation of the liberty guaranteed by the due process clause does not afford ground for removal. This was an action in a federal court to enjoin a threatened state criminal prosecution which, it was alleged, would deprive the plaintiffs of rights to freedom of speech and of religion—a prosecution which, on the view of the appellants here, could have been removed under the present §1443(2). The Court held that the action had been properly brought under what has become 28 U. S. C. §1343 (3) giving federal jurisdiction over suits to enforce claims under Rev. Stat. §1979, now 42 U. S. C. §1983, but that an injunction against the state prosecution had been correctly denied. It said, 319 U. S. at 163, that "Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved," and "Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted." These remarks would hardly have been appropriate if the Court had thought the criminal proceeding sought to be enjoined was one whose removal was authorized under the "well defined statutory exceptions." [16]

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a basis for removal under §1443(1), and a practice of discriminating in enforcement would likewise do so except for the Supreme Court decisions cited below. Whether the existence of such a practice gives "color of authority" to violate state laws is another matter, mentioned above, which it is unnecessary to decide on these appeals.

16 It is hardly attributing "omniscience" to the Court that decided the *Douglas* case, see fn. 9 to the instant dissent, to suggest that a bench including Justices so devoted to the cause of civil rights and so expert in federal jurisdiction as Stone, Black, Frankfurter, and Douglas, would not have implied so strongly that the case before them could not have been removed without considering whether it could have been.

Our view that §1443(2) applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights, is strengthened by the very different effects of the two constructions on federal-state relations. The former construction would mean, e.g.,—if the obstacle discussed in Section III of this opinion can be surmounted —that a freedman who was arrested for occupying property he had purchased or for fighting off an evictor might remove on the basis that he was acting "by virtue of or under color of authority derived from" Rev. Stat. §1978, or, in today's terms, that the same might be true of persons utilizing self-enforcement in respect of the rights "to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation," granted by §201(a) of the Civil Rights Act of 1964. It could be argued in such cases that Congress had focused upon a particular problem and had decided that allowing removal to persons who had engaged in self-help to achieve certain specific goals was necessary to effectuate its purpose.

Such a construction would be altogether different from saying that the Congresses of 1875, of 1911, or of 1948 meant to authorize removal whenever a state suit or prosecution concerned what allegedly was an unconstitutional deprivation of the universal right to "liberty." Even if there were basis for somehow limiting this to civil rights demonstrators, the burden cast on the federal courts would be formidable, as recent events have shown. But a claim of such deprivation would also exist in the case of a suit or prosecution for publishing an allegedly lewd or subversive book, for exhibiting an obscene moving picture, for a speech claimed to constitute an incitement to riot, for libel of a public official, for parading for a political cause without a permit, for violating a Sunday law, for refusing to obey a public health measure offensive to a religious belief, or in

other cases too numerous to mention. Neither do we see any reasoned basis whereby, on appellants' argument, only rights to liberty of the First Amendment type would afford basis for removal. Prosecutions for the practice of professions without a license, for the sale of articles alleged to be unconstitutionally banned, or for conduct which, it is claimed, the state has not prohibited with required specificity—all these and many more would come within the sweep of §1443(2). Compare *Hornsby* v. *Allen,* 326 F. 2d 605, rehearing denied, 330 F. 2d 55 (5 Cir. 1964). Although the unexpected character of such a wholesale transfer of jurisdiction from state to federal courts, the disruption of relationships incident to making the federal courts a major forum for state criminal trials, often at places remote from the scene of the crime, and the burden that would be placed on federal tribunals ill-equipped to shoulder new tasks of such magnitude, would not justify refusal to respond to a clear Congressional command, such considerations suggest the need for carefully attending to what Congress meant by §1443(2) and its predecessors. Realizing the hindrance to interpretation resulting from the prohibition of direct review of remand orders since 1887, we think the presumption is still "powerful that such a far-reaching dislocating construction . . . was not uncovered by judges, lawyers or scholars for . . . years because it is not there." *Romero* v. *International Terminal Operating Co., supra,* 358 U. S. at 370-71.

In recognition of the disruptive character of such a construction, the dissent seems to suggest a principle limiting invocation of the due process clause as regards §1443(2) to cases where a protest concerns an alleged denial of substantive equal protection. But the guarantee of liberty in the due process clause either is or is not a law providing for equal rights within the removal statute, and if it gives "color of authority" for one type of protest, it does so for

all. The First Amendment as incorporated in the Fourteenth protects speech and petition regardless of subject-matter; protests about nuclear armament, or substandard wages, or the grant or denial of public aid to parochial schools, are protected to the same degree as protests over the racial composition of public schools.

Because of the extensive review of the historical development of the relevant legislation demanded by the importance and the novelty of the issues and in order to promote certainty as to our decision, we here summarize our conclusions:

(1) We reject the State's contention that the "denial" and the "authority" clauses of the civil rights removal statute should be read as one; the statute permits removal in either of two distinct categories of cases, today as it has since 1866.

(2) We reject any view that the "authority" clause of the civil rights removal statute can be invoked only if the petitioner preliminarily demonstrates that the challenged conduct was within the federal law relied on, the very issue on which he seeks a federal trial—subject only to the *caveat* that particular conduct may have gone so far beyond any possible interpretation of the rights allegedly conferred as not to furnish a colorable basis for removal.

(3) We do not decide whether the "authority" clause is limited to officers and persons assisting them or acting in some way on behalf of government, or whether private citizens exercising equal rights, such as the beneficiaries of the equal rights statutes of the Reconstruction era and of certain provisions of the Civil Rights Act of 1964, may invoke the "authority" clause of the statute as well as the "denial" clause.

(4) When the removal statute speaks of "color of authority derived from" a law providing for equal rights, it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such a law should be able to do something and not merely to one where he may have a valid defense or be entitled to have civil or criminal liability imposed on those interfering with him.

(5) When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U. S. C. §1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all.

It should be made clear that the obstacles we perceive to applying §1443(2) to removal by civil rights demonstrators would not be at all present in cases where an appropriate showing was made for the invocation of §1443(1). An allegation that Negroes engaged in civil rights demonstrations were being punished in the state courts whereas white persons engaging in similar demonstrations for other causes were not, cf. *Cox* v. *Louisiana, supra,* or that Negro demonstrators were required to post high bail whereas whites were not, would constitute clear instances of denial to "any person" of the right, provided by 42 U. S. C. §1981, that all "shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." There is no possible doubt that §1443(1) applies to the grantees of equal rights under the equal protection clause and egalitarian statutes,[17] and it imposes no requirement of showing "color of authority" or "inconsistency" although

17 This consideration answers the point made in fn. 10 to the dissent and the text accompanying it.

it does demand a substantial claim of denial or inability to enforce. The difficulty is that what is now §1443(1) was largely deprived of effect by the decisions in *Virginia* v. *Rives,* 100 U. S. 339 (1879); *Neal* v. *Delaware,* 103 U. S. 370 (1881); and *Kentucky* v. *Powers,* 201 U. S. 1 (1906), which limited its application to denial by state laws as distinguished from state practice. The Congressional debate on Title IX of the Civil Rights Act of 1964 indicated a not unreasonable expectation that these restrictive decisions would be reexamined, see 110 Cong. Rec. 6739-40 (daily ed. April 6, 1964) (remarks of Senator Dodd), and the question is now before the Fourth Circuit in *Baines* v. *City of Danville,* No. 9090, and *McGhee* v. *City of Danville,* No. 9082. If that expectation should go unfulfilled, Congress may well do the reexamining or otherwise amend the centenarian civil rights removal statute—not, of course, by restricting the statute, as the dissent suggests, but by removing the restriction that had been judicially imposed on the first clause and by clarifying the scope of the second. But the relative inutility of §1443(1) in the interval affords no warrant for embracing within the second clause of §1443 cases of the type with which the first clause seems to be concerned, by means of a latitudinarian construction, unsupported by language and contrary to history, which, in order to meet conditions unhappily and, we hope, temporarily prevailing in a few states, would swamp the federal courts throughout the country with prosecutions removed as concerning acts allegedly protected by guarantees of the Fourteenth Amendment.

Although we fully recognize the merits of a case-by-case approach with respect to constitutional determinations, including any that may be relevant to these petitioners, we find this singularly unattractive as applied to the question where a suit should be tried—an issue which in the interests of both parties should be speedily determined

without the necessity of lengthy preliminary hearings, on the very issues that will arise on the trial itself, by a court to which removal is sought. Removal under §1443(2), unlike §1443(1), does not depend on conditions in a particular state or as to a particular trial; it ought be possible for a court to lay down some general principles for its construction. Our dissenting brother is quite right in saying that we have not succeeded in furnishing a definition of "color of authority" that will automatically determine every case, and we plead guilty to having postponed the issue whether §1443(2) may ever be invoked by persons other than officers or quasi-officers to a case where its decision is required. But at least we have taken the difficult road of deciding these cases as best we can, thereby giving indications that also ought be somewhat useful for the decision of others, rather than permitting these serious questions to rest in limbo while words which could not alter the result are added to the removal petitions, lengthy hearings are held in the district courts and the proceedings ultimately return here.

The orders of remand are affirmed.

KAUFMAN, *Circuit Judge* (concurring):

Judges do not live in ivory towers; they realize that their opinions are frequently misunderstood, misinterpreted and read otherwise than intended. Since this appeal raises extraordinarily delicate problems, which have been explored in Judge Friendly's able opinion, and so many of which may have an important impact in the civil rights area and on the administration of the federal courts, I deem it my responsibility to elucidate my reasons for concurring in today's decision.

Weighty problems in the sensitive area of federal-state relationships are involved in what the nation's press has

recently termed "the rage to remove." Time Magazine, Oct. 30, 1964, p. 88. On the one hand, the already overburdened lower federal courts should not be deluged with every state criminal case bearing any alleged connection to civil rights no matter how slight unless this is mandated. At the same time, we would be closing our eyes to the practical realities of the contemporary national scene if we did not recognize, along with Congress, that federal rights would have only paper meaning if state criminal prosecutions could never—whatever the circumstances—be removed to the federal courts.

Judges are not "forbidden to know as judges what [they] see as men." *Hu An Kow* v. *Nunan,* 5 Sawy. 552, 560, Fed. Cas. No. 6546 (1879). The necessity for a federal forum is not confined to specified regions of the country. Guarantees of equality may be ignored on both sides of the Mason-Dixon line, compare *Brown* v. *Board of Education,* 347 U. S. 483 (1954), with *Taylor* v. *Board of Education (New Rochelle, N. Y.),* 191 F. Supp. 181 (S. D. N. Y.), *aff'd,* 294 F. 2d 36 (2d Cir.), *cert. denied,* 368 U. S. 940 (1961), and on either of our ocean coasts, compare *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886), with *Bolling* v. *Sharpe,* 347 U. S. 497 (1954). The conditions which justify removal, not their geographic setting, provide the predicate for our constitutional and statutory duties.

This makes it all the more important that we be unmistakably clear as to our present holding. But it does not require us to settle, once and for all time, every problem which might conceivably arise under an imprecise and inexpertly drafted section of a statute, almost 100 years old and never before applied in the manner the appellants urge. As appellate judges we have an obligation to lay down guidelines as clear as the circumstances permit for the federal district courts and to avoid an overly technical approach that will have meaning only for the cases before

us. At the same time, I am mindful of Senator Dodd's recent recognition in the debates leading to passage of the 1964 Civil Rights Act that it is extremely difficult to specify with precision the kinds of cases which ought to be removable under Section 1443. 110 Cong. Rec. 6739-40 (daily ed. April 6, 1964). My decision to concur is made in the light of these competing considerations.

I agree with Judge Friendly that it is unnecessary to decide and that we have not decided whether subdivision (2) covers only officers and those persons assisting them or acting in some way in behalf of government. In this connection, it seems imperative that we, as well as Congress, recognize that federal intervention has all too often proved essential to safeguard federal rights from state emasculation, and that some state courts unfortunately have not been immune to the epidemic of prejudice and intolerance. Against such a background, the statutory right of removal in certain instances appears but another effort to provide a measure of federal protection for the rights of the Negro. We have not decided today whether for the private citizen that right exists only in a §1443(1) situation, in which removal has been judicially confined to limited, and perhaps unduly restrictive, situations. See *Virginia* v. *Rives,* 100 U. S. 339 (1879); *Kentucky* v. *Powers,* 201 U. S. 1 (1906).

I also believe that subdivision (2) was intended to apply to state prosecutions for acts done under the color of authority of rights stated in terms of equality, but not to acts protected by the general constitutional guarantee of liberty. The statute, in short, is applicable where the persons seeking removal are being prosecuted for doing something which a specific federal law providing for equal rights gave them the impetus and authority to do. This would seem to mean, as Judge Friendly has articulated, that removal is available to persons arrested for acts connected

with the self-enforcement of the right to full and equal enjoyment of the facilities of hotels, restaurants, theatres, and other public places. And the right to remove in such cases is of vital significance for it gives meaning to Congress' enactments ensuring equal rights and its directions and authorizations, express or implied, that the beneficiaries should enjoy those rights free from restraint by the states; the federal courts, in those instances, will be available to make the rights viable.

Since the Bill of Rights and the Fourteenth Amendment were intended to safeguard the fundamental rights of individuals against governmental impairment, judges are sorely tempted, when the state's awesome powers must be weighed against the citizen's rights, to stretch the meaning of statutes in order to strike the balance in favor of the individual. But, Justice Cardozo reminded us in his typically poignant language, that a judge "is not a knight errant roaming at will in pursuit of his own idea of beauty or of goodness . . . He is not to yield to spasmodic sentiment, to vague and unregulated benevolence . . ." The Nature of the Judicial Process 144 (1921).

A caveat is in order here. I must emphasize that we are not saying the petitioners are forever barred from coming into the federal courts to protect their constitutional rights. Indeed, the contrary is true, for if convicted in the state courts, they may still seek review in the Supreme Court or invoke the time-honored writ of habeas corpus in a federal court to vindicate their federal rights. The Supreme Court's recent decision in *Hamm* v. *City of Rock Hill,* —— U. S. —— (1964), directly reviewing state court convictions, is striking proof of the cloak of federal protection afforded individuals in prosecutions by the states. The Court's holding that it is not a crime to attempt peacefully to secure equal treatment in a place of public accommodation indicates a willingness not only "to obliterate the effect of a

distressing chapter of our history," but also to give full meaning to the constitutional guarantee of equal treatment under the law for all citizens. See also *Cox* v. *Louisiana*, —— U. S. —— (1965).

Because the problem before us is so difficult, my brothers have discussed extensively whatever authorities they believe shed some light on its resolution. But, with this done, it is important to place in proper focus the sole question we face. By our decision today we are attempting to unravel the words of a statute, not constitutional rights, and to decide whether the petitioners in this case are entitled *in the first instance* to a federal trial of a state charge. I do not believe that they are for all available evidence which would help us resolve the meaning of this ambiguous statute points in the other direction.

If our reading of §1443(2) in this difficult and uncertain area is too narrow, Congress is still available for enlargement or clarification of the statute, which all on this panel agree lacks clarity. If removal should be more freely available, legislative consideration and action can best bring about a fair accommodation of the competing interests. The function of weighing and appraising the host of factors involved, were we to adopt the novel argument urged upon us for removal of these cases under an amphibolic subdivision of such an antique and venerable statute, is "more appropriately for those who write the laws, rather than for those who interpret them." *United States* v. *Gilman*, 347 U. S. 507, 513 (1954). As Mr. Justice Frankfurter once perceptively noted, "where policy is expressed by the primary lawmaking agency in a democracy, that is by the legislature, judges must respect such expressions by adding to or subtracting from the explicit terms which the lawmakers used no more than is called for by the shorthand nature of the language." Westin, The Supreme Court:

Views from Inside 83 (1961).[1] Indeed, the suggestion in the dissenting opinion that the loose conglomeration of inartistic petitions disables us from giving guidance for future litigation, together with a candid recognition that formulation of a clear, all-encompassng standard is virtually impossible, indicates that it is for Congress, not us, to adopt a broader reading.

With this exposition of my views, I concur in Judge Friendly's thorough opinion.

MARSHALL, *Circuit Judge* (dissenting):

The vague and conclusory allegations in the ten removal petitions, covering almost sixty persons, involving many separate offenses for a variety of acts, some done on different days and different places, the willingness of the state to waive all objections to "formal" defects in the removal petitions in order to establish a "precedent", and the presentation of all these removal petitions on appeal as one conglomerate have profoundly obscured the issue for our determination. Judge Friendly, with his usual scholarly excellence, has met the apparent insurmountable task of dealing with these appeals on this basis and he has attempted to delineate the general scope of §1443(2). However, I am convinced that the problem presented by these cases can only be de-

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1 Practical considerations should never impede judicial recognition of an individual's right to redress in the federal courts. But if the right of removal under §1443(2) is to be broadened, Congress can consider the insurmountable burdens that would, for example, be cast upon the nine judges of the Federal District Court for the Northern District of California if the 814 Berkeley students recently arrested for free-speech demonstrations on the college campus were entitled to remove their prosecutions to the federal court on the ground that they were protesting alleged violations of the equal protection clause. As recently as 1961, Congress recognized the plight of the overburdened federal courts by creating 73 new judgeships. 73 Stat. 80 (1961). Further Congressional action along such lines would seem to be a necessary corollary to enlargement of the removal jurisdiction.

cided case by case and on the basis of informative petitions, see 28 U. S. C. §1446(a) (requiring "a short and plain statement of the facts"). Moreover, I find myself in disagreement with the basic conclusion of the majority opinion and therefore dissent.

The importance of approaching these appeals on a case-by-case basis cannot be overestimated. A great array of charges, including assault third, disorderly conduct, maintaining a nuisance, resisting an officer, obstructing railway cars, unlawful intrusion, unlawful assembly, loitering at a school building and inducing truancy, are involved in this assortment of removal petitions, and yet the conglomerate presentation and disposition of these appeals tend to ignore the possibility that a difference in the specific conduct charged might make a difference under §1443(2). For example, if the petitioners arrested and prosecuted for violating the truancy law had merely sought to induce parents not to send their children to a segregated school, which denies the "equality of law" guaranteed by the Constitution, this, in my opinion, could be a case covered by §1443(2), while, on the other hand, a charge of third degree assault might very well not be covered.

Moreover even on the majority's view that the conduct involved in all these petitions can be reduced to protests against racial discrimination and segregation, some of the petitioners might well be entitled to removal under the majority's own interpretation of §1443(2). I understand my brothers to suggest that under §1443(2) removal might be available to individuals arrested and prosecuted for taking self-help measures to secure equal treatment guaranteed by federal laws providing for equal rights, and further that a peaceful protest might be considered such a self-help measure.[1] The majority insists that this issue

1 See *infra* pp. 1006-1010.

is not present in these appeals and that no words could be added to the removal petitions that would change their affirmance of all the remands. However, I am not so confident. Some of the petitioners, at least those charged with loitering at a school building and inducing truancy, might well have been doing nothing more than peacefully picketing a public school under the belief that it was a segregated public school maintained in violation of the Equal Protection Clause. Any doubts as to whether this is the alleged factual pattern should, in all fairness, be resolved by affording petitioners an opportunity to amend. For the removal petitions were drafted primarily with the first clause of §1443 in mind and this is a case of first impression, involving a previously unexplored part of §1443 and raising wholly unique and delicate issues. I refuse to rely on the fact that the protests were widely publicized and much less on the failure of appellants to fill in the supposed missing facts during oral argument or in their not-so-thorough briefs; this lapse could be readily explained by the fact that the majority's interpretation of §1443(2) could hardly have been anticipated.

My brothers' desire to help the district courts in this circuit, the Supreme Court and even Congress by exposing the problems and stating what is "their proper solution under existing law" is indeed commendable. However, we have long learned that this desire can only be satisfied at least for federal judges, through the decision of a particular case on the basis on a readily discernible set of facts. And, although I may be unduly skeptical, I have some serious doubts as to whether my brothers' decision will provide any of their hoped-for "guidance." Distinction is built upon distinction, and the clarifying foundation of a single factual pattern is lacking; and the obvious and frequent need to spell out what is *not* being decided today amply reveals the danger of abstract opinions.

I do not intend to pass judgment on these cases, either individually or collectively. Yet certain propositions in the majority opinion urgently require comment, even at the risk of joining the rather abstract discussion.

My disagreement with the majority's interpretation of §1443(2) stems from its refusal to recognize any meaningful color of authority emanating from the Fourteenth Amendment.

The "color of authority" concept of §1443(2) is not correctly described or defined. The majority suggests that in order for a law to provide "color of authority" to perform an act, it must do more than protect conduct by giving remedies to the offended party—it must be "an encouragement" or must "direct" the individual to act.

This seems to be a rather obvious departure from common usage and understanding. An individual acts under the "color of authority" of a law at least when his conduct is protected by that law, when interferences with that activity are unlawful and the subject of civil or criminal legal remedies. To say that "something more" than this protection is required is illusory, granted that we are talking about individuals acting in a non-official capacity. The most familiar legal technique for "encouraging" certain private activity is to make interferences with that activity unlawful. And one does not have to fully embrace Mr. Justice Holmes' positivism, see *The Path of the Law,* to realize that usually or invariably unlawful conduct is the subject of civil or criminal sanctions, or to look at it from the view of the "offended party" rather than the "badman," that unlawful conduct is the subject of civil or criminal remedies. The law not only protects conduct by making interferences with it unlawful, but also by providing legal remedies against such interferences.

The majority, while apparently conceding that this is the usual understanding of the words "color of authority,"

insists that the "particular context" in which these words are used requires a much more restrictive interpretation. One alleged aspect of this context is that §1443(2) "indubitably applies" to officers and quasi-officers. But I fail to appreciate the significance of this fact. Either the assumption underlying our analysis of the "color of authority" concept, to borrow a thought from the majority, "is or is not" that the section is also applicable to non-officers. The manner in which a private person acts under the authority of a law need not be the same as that of an officer. Furthermore, there is no reason for supposing that an officer acts under the "color of authority of any law providing for equal rights" only in the rather limited situation when there is a statute or order specifically directing him to do some particular act. Cf. *Cunningham* v. *Neagle,* 135 U. S. 1, 58-59 (1890). The second alleged aspect of the "particular context" is that the first clause of §1443 uses the phrase "a right under" rather than "under color of authority." The majority concludes that "It necessarily follows that 'under color of authority derived from' in §1443(2) has a narrower meaning than 'a right under' in §1443(1)." It seems to me, however, not that one phrase is necessarily "narrower" than the other, but that the special province of §1443(1) is the denial of equal rights in the course of proceedings in state courts, while §1443(2) focuses on the denial of equal rights in different situations. This shift focus adequately explains the change from "a right under" to "under color of authority."

One aspect of the "particular context" seems to escape the majority, namely, that the "color of authority" referred to in §1443(2) is to be derived from "any law providing for equal rights." The words "color of authority" should not be read in isolation, but rather as an integral part of the phrase "color of authority derived from any law providing for equal rights." The majority readily admits

that the Equal Protection Clause and all the civil rights statutes are laws providing for equal rights. Yet at the same time the words "color of authority" are so construed as to virtually preclude any of these laws from ever giving what is deemed to be the requisite kind of authority. In construing what the phrase "color of authority derived from any law providing for equal rights" means it would be fair to presume that the kind of authority required would be of the type generally provided by the laws providing for equal rights. For the most part, these laws do not explicitly and specifically "encourage" and "direct" people to do things in the stringent sense suggested by the majority. Instead they protect certain activity by declaring interferences with that activity unlawful and by providing civil and criminal remedies.[2] To interpret the "color of authority" concept more stringently would virtually make §1443(2) unavailable, even to officers, in the bulk of civil rights cases, the acknowledged province of that section.

On occasion the majority makes a generous reference to the Civil Rights Act of 1964 and the other civil rights

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2 Appellants could conceivably argue that if the state permits or would permit protests or expressions of dissatisfaction by other groups and for other causes, then they were acting under the color of authority of the Equal Protection Clause or §1981, certainly laws providing for equal rights, in that they command the State not to interfere with them and thereby protects that activity, see *Niemotko* v. *Maryland*, 340 U. S. 268, 272 (1951); cf. *Steele* v. *Superior Court of California*, 164 F. 2d 781, 782 (9 Cir. 1947), *cert. denied*, 333 U. S. 861 (1948), and *Hill* v. *Pennsylvania*, 183 F. Supp. 126 (W. D. Pa. 1960), both suggesting that there would be removal (though not specifying whether it would be under clause 1 or 2 of §1443) if the arrest or prosecution was alleged to violate the Equal Protection Clause. The majority insists that appellants do not urge that the interferences, arrests and prosecutions of appellants had the purpose and effect of discriminatorily or unequally denying them of their rights to speak, assemble and protest grievances. But, given the confusing presentation of all these removal petitions and the fact that only during oral argument did we learn that petitioners have decided to rely exclusively on the second clause of §1443, I fail to see how the majority could be so confident.

statutes, and intimates that they might provide the "color of authority" for protests seeking to secure the equal rights guaranteed by these laws. I doubt whether this comports with the majority's stated definition of the "color of authority" concept, and, if it does, I must once again express my doubt as to whether the majority is being consistent in affirming the remand of all these cases. For example, appellants arrested for loitering at a school building and inducing truancy might well have been doing nothing more than peacefully picketing a segregated public school maintained in violation of the Equal Protection Clause.[3] This clause is no less a law providing for equal rights than the Civil Rights Act of 1964 and the other civil rights statutes and it confers the same type and quantum of authority. The affinity between the Fourteenth Amendment and the civil rights statutes is far more than obvious. As Chief Justice Vinson wrote in *Hurd* v. *Hodge*, 334 U. S. 24, 32 (1948):

> It is clear that in many significant respects the statute [the Civil Rights Act of 1866] and the [Fourteenth]

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3 Some of the petitioners apparently allege that they were protesting against the denial of rights guaranteed by civil rights statutes. 42 U. S. C. §1981 guarantees, among other things, the right to be free from discriminatory and unequal treatment by police, and some of the petitioners claim that they were protesting against the denial of this right (one aspect of "police brutality"). Some petitioners also seem to allege that they were protesting against "the denial of the equal protection of the laws to Negroes in the city, state and nation with reference to housing" and although such an allegation is vague, conclusory, and totally inadequate, conceivably these petitioners might claim, if they were even given an opportunity to do so, that they were protesting against racial discrimination in federally assisted housing that violated the President's order, Executive Order No. 11063, Nov. 21, 1962, 27 F. R. 11527, "Equal Opportunity in Housing"; and there seems to be some authority for the proposition that an executive order is within the ambit of the word "law" in the §1443(2) phrase "any law providing for equal rights," see *Hodgson* v. *Millward*, 12 Fed. Cas. 285, No. 6,568 (E. D. Pa. 1863) (see 3 Grant (Pa. 1863) 412, for the facts), approved in *Braun* v. *Sauerwein*, 10 Wall. 218, 224 (1869).

Cf. also *Hamm* v. *City of Rock Hill*, —— U. S. —— (1964).

> Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic laws of the land.

See generally Frank & Munro, *The Original Understanding of "Equal Protection of the Law,"* 50 Colum. L. Rev. 131 (1950).

That the Equal Protection Clause provides for "equal rights" cannot be doubted and there is no reason why the word "law" in §1443(2) should be confined to Congressional enactments, nor why only Congressional enactments could confer the type of "authority" required by §1443(2). Such an artificial and unduly restrictive position has been rejected in other contexts, see, e.g., *Cunningham* v. *Neagle,* 135 U. S. 1 (1890), and it ignores the fact that there would be little reason for putting in a Congressional statute what was already provided for by a constitutional amendment. Obviously the reason Congress did not explicitly include within, for instance, the Civil Rights Act of 1964 a flat prohibition condemning segregated education is that it operated on the rather reasonable presumption (see Title IV, now 42 U. S. C. §§2000c-2000c-9) that this denial of equal rights was already proscribed by the Equal Protection Clause, *Brown* v. *Board of Education,* 347 U. S. 483 (1954), *Cooper* v. *Aaron,* 358 U. S. 1 (1958). Although the Fourteenth Amendment "makes no attempt to enumerate the rights it was designed to protect" but "speaks in general terms," these terms "are as comprehensive as possible" and create a "positive immunity" against state-imposed racial discrimination, *Strauder* v. *West Virginia,* 100 U. S. 303, 307, 308 (1880). If, according to the majority, removal

under §1443(2) might possibly be available to individuals peacefully protesting against segregated public accommodations, it is difficult to see why removal would not be equally available under §1443(2) to individuals peacefully protesting against segregated public education.

Some appellants seem to rely on a theory of self-help, and it seems important to state their argument in all its fullness, putting to one side any interest in determining whether it is tacitly acknowledged in the majority opinion. As the Supreme Court recently stressed in *Hamm* v. *City of Rock Hill*, —— U. S. —— (1964), measures undertaken by private individuals to secure rights guaranteed by a law providing for equal rights may well come within the protection of that law and these individuals may well be acting under the authority of that law. Moreover, appellants could reasonably argue that if, for example, it would be a form of self-help for a Negro to attempt to register in a state university that the state has sought to maintain exclusively for the whites, then the same Negro would be employing a form of self-help to eliminate the denial of his equal rights if he picketed the university after the officials refused to register him because of his race. The difficult problem is to determine which types of self-help measures come within the ambit of protection and authority of the law granting the equal rights, or more specifically, whether appellants' alleged peaceful[4] protest and demonstration against the denial of these rights falls within that ambit.

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4 Presumably the question whether the protests were peaceful is to be determined in the federal district court. See *Hodgson* v. *Millward*, 12 Fed. Cas. 286, No. 6,568 (Cir. Ct. E. D. Pa. 1863); cf. *Tennessee* v. *Davis*, 100 U. S. 257, 261-262 (1879) (federal officer case). See generally *Townsend* v. *Sain*, 372 U. S. 293 (1963) (habeas corpus), stressing the importance of a full and fair evidentiary hearing in a federal forum when federal constitutional rights are at stake.

At one point the majority suggests that the "law" invoked by petitioners as the "law providing for equal rights" must provide the (color

Two factors must be considered in grappling with this problem. First, peaceful protest, speech and petition, is a form of self-help not unknown during the era of Reconstruction when §1443(2) was forged, see, *e.g.*, Aptheker, *A Documentary History of the Negro People in the United States,* 536-37 (1951); McPherson, *The Negro's Civil War,* 245-70 (1965). Secondly, this form of self-help—peaceful protest and demonstration—is tremendously important in our federal constitutional scheme. It is constitutionally protected, see *Thornhill* v. *Alabama,* 310 U. S. 88 (1940). As Mr. Justice Harlan asserted in his concurrence in *Garner* v. *Louisiana,* 368 U. S. 157, 201-02 (1961), in regard to a similar form of self-help, the peaceful sit-in,

> It, like speech, appeals to good sense and to "the power of reason as applied through public discussion," *Whitney* v. *California,* 274 U. S. 357 (Brandeis, *J.*, concurring), just as much as, if not more than, a public oration delivered from a soapbox at a street corner . . . If the act of displaying a red flag as a symbol of opposition to organized government is a liberty encompassed within free speech as protected by the Fourteenth Amendment, *Stromberg* v. *California,* 283 U. S. 359, the act of sitting at a privately owned lunch counter with the consent of the owner, as a demonstration of opposition to enforced segregation, is surely within the same range of protections.

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of) "'authority' to disregard [state] laws providing for the equal punishment of disturbers of the peace." But this is either to misread §1443(2) or to misunderstand the position of some of the petitioners. Some seem to insist that they were doing nothing more than peacefully picketing, not in the least unlawful in New York; and they claim that they *acted* under the color of authority of federal laws providing for equal rights, all that is required by §1443(2), not that they *violated state laws* under the color of authority of federal laws providing for equal rights.

See *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Field* v. *South Carolina*, 375 U. S. 44 (1963); *Henry* v. *Rock Hill*, 376 U. S. 776 (1964).

This seems to be the relevance of the Due Process Clause to appellants' arguments. It is not that the Due Process Clause, in isolation and of its own force, is a "law providing for equal rights," under whose authority appellants allegedly acted, but rather that appellants sought to effectuate the mandates of the Equal Protection Clause, or the Fourteenth Amendment as a whole, and did so in a way that is allegedly protected by the Due Process Clause, or the Fourteenth Amendment. We should approach the problems inherent in some of these petitions, not by severing and separately compartmentalizing the Due Process and Equal Protection Clauses, but realizing that they are both part of the same constitutional amendment, undoubtedly the most basic of all laws providing for equal rights, and that these clauses often intersect. *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). Some appellants, perhaps those arrested for loitering at a school building and inducing truancy, might be able to allege such an occasion has arisen and argue that this was the "law" under whose authority they acted. Yet given the conglomerate approach of the majority, the vague, conclusory and uninformative character of the pleadings and the failure of the district courts to get beyond the pleadings, it seems impossible and inappropriate for us to assess this argument now.

I will say, however, that there seems to be little basis for the majority's fear that if any of the appellants who were peacefully protesting are entitled to removal under §1443(2), then "whenever a state suit or prosecution concerned what allegedly was an unconstitutional deprivation of the universal right to 'liberty' " removal would be possible. A limiting principle could perhaps be found in the fact that the liberty involved in some of these removal

petitions is the liberty to express dissatisfaction with the state's alleged denial of equal rights. The purpose and form of the exercise of liberty is not without significance, for, as seen in this light, the exercise of this liberty is merely another form of self-help to secure the rights guaranteed by the Equal Protection Clause or other federal laws providing for equal rights.

The majority's effort to resolve some of the basic questions raised in these appeals by reconstructing the intention of the Congress of 1875[5] is also troubling. The thrust of the argument is to show that the Due Process Clause is not a "law providing for equal rights" within the meaning of §1443(2). Although I do not think that appellants' argument need stand or fall on that proposition, I gather that the majority is prepared to turn the edge of its argument to meet any interpretation of §1443(2) that would entitle any of the petitioners to removal under any set of facts they could reasonably allege. I therefore must insist that "this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute," *Greenwood* v. *United States,* 350 U. S. 366, 374 (1956). Legislative history may often shed light on the meaning of a statute, yet we have learned before that little authoritative information can be obtained from the legislative history of the civil rights legislation of the last century, see *Brown* v. *Board of Education,* 347 U. S. 483, 489 (1954).

In attempting to reconstruct "the intention" of the 1875 Congress, the majority relies not on debates or reports or statements by the revisers or legislators, few of which were specifically addressed to what is now clause 2 of §1443, but rather on the proposition that no such far-reaching result as would follow from allowing removal to

5 See footnote 7 in the majority opinion.

some of these petitioners could have been intended. For the most part the proposition rests on the argument that the codifiers of 1875 were responsible for the phrase "under color of authority derived from any law providing for equal rights" and that "so great a substantive change" as would flow from allowing removal under §1443(2) could not have been intended to be accomplished by "what was represented to be a mere codification." However, two points can be made; first, it is not at all clear that in the eyes of the 1875 legislators and revisers none of petitioners would have been entitled to removal under the law existing prior to the codification, and secondly, in order to understand how far reaching and radical the change would be, one must place the civil rights removal provisions in its historical context, if any assessment of the intention of the 1875 Congress is to be made.

In support of the first point, appellants could make a strong argument that the 1875 revisers used the phrase "any law providing for equal rights" as a shorthand technique for referring to all the three previous civil rights acts, the Civil Rights Act of 1866,[6] the Civil Rights Act of 1870 (sections 16 and 17 are now §1981 and §1982), and

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6 The majority emphasizes that none of the acts of which §3 of the Civil Rights Act of 1866 was originally linked (§1 of the 1866 and the Freedmen's Bureau Act) spoke of protecting "freedom of speech or petition against state infringement." However, section 1 of the Civil Rights Act of 1866 provided in part "all persons born in the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same rights . . . to full and equal benefit of all laws and proceedings for the security of person and property . . ." Given the fact that the 1866 Act preceded the enactment of the Fourteenth Amendment, although it followed the enactment of the Thirteenth Amendment, this catch-all and vague phrase "full and equal benefit of all laws" might have been intended to afford some measure of protection to the freedom of speech and petition guaranteed by the First Amendment and similar state constitutional provisions for those attempting to secure the full measure of equality for the freedmen. Cf. *Hurd* v. *Hodge*, 334 U. S. 24, 32 (1948).

the Civil Rights Act of 1871 (§1 of which is now §1983), not to mention the Fourteenth Amendment. Or, to put it another way, the majority concedes, that the phrase "any law providing for equal rights" referred to the first and second Civil Rights Acts of 1866 and 1870, and the burden is then cast upon it, to show that the revisers or Congress did not intend to include, or rather intended to exclude, the third act in this series of civil rights legislation from this supposedly "readily explicable" reference to "any law providing for equal rights."[7] This burden would seem to be intensified by the text of §1983 when it was originally enacted in 1871 as part of the third Civil Rights Act:

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7 The majority's discussion of the legislative history is prefaced by the statement "all that is 'authorized' by the statutes [1983 and 1985] . . . is the award of damages or of criminal punishment." The question is not, however, whether the "law providing for equal rights" authorized the protests in the way that a principal may have "authorized" an agent, but rather whether the individual acts under the authority of that law. As suggested earlier, *supra* p. 1005, an individual would be acting under the authority of the law if he was protected in that activity by that law; and although §1983 does not provide the grant of substantive rights, it presumes or tacitly incorporates the grant in the Fourteenth Amendment (§1983 was originally enacted as section 1 of the 1871 Act "to enforce the Provisions of the Fourteenth Amendment . . ." 17 Stat. 13) and one of the fundamental means of protecting any conduct is, as §1983 does, to provide a legal remedy for interferences with that activity. If petitioners would have a remedy under §1983, against those interfering with their conduct, they could well argue that they were acting under the "color of authority" of §1983.

The mere fact that §1983 is "coextensive with the whole reach of the Constitution" does not preclude the possibility that it is a "law providing for equal rights," and much less that it could not have been viewed as such by the 1875 legislators and revisers. The deprivation of constitutional rights stemming from racial discrimination are certainly proscribed, and remedies provided, by that law, and this seems to have been the primary concern of the legislators, see generally *Monroe* v. *Pape*, 365 U. S. 167 (1961). The more difficult question to resolve is whether §1983 could also be viewed as "a law providing for equal rights" when the deprivation of constitutional rights does not stem from racial discrimination. This would create the further problem of deciding whether a law could be classified as a "law providing for equal rights" for all purposes, if in one primary sense it does provide for equal rights.

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who, under color of any law, statute, ordinance, regulation, custom or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Appellants could argue that the language "other remedies provided in like cases in . . . [the federal] courts, under the [1866] act" as well as "and the other remedial laws of the United States which are in their nature applicable in such cases" was a sufficient basis for the 1875 revisers and legislators to have believed or assumed (but see footnote 12 in the majority opinion arguing only that this assumption or belief might have been mistaken) that all of §3, including the removal provisions, of the 1866 Act, was already available to those claimed that they were being prosecuted for exercising the rights protected under §1983; and that by using the phrase "any law providing for equal

rights" they would also be referring to this law. This argument could be further strengthened by the fact that the second Civil Rights Act of 1870, which the majority recognizes as a "law providing for equal rights" within the meaning of §1443(2), incorporated the removal provisions by a similar summary reference to the Act of 1866;[8] the revisers and legislators might have assumed that if such a reference could make the removal provisions of the 1866 Act available in connection with the rights protected by the 1870 Act, the same would be true for the 1871 Act. I do not pass judgment on this argument, but I have spelled it out only to reveal one of my many reasons for believing that any attempt to reconstruct the intention of the 1875 legislators, even if it is agreed that their primary purpose was codification, is likely only to uncertainty and indecisiveness.[9]

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8 "Section 18. AND BE IT FURTHER ENACTED, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act."

It should be noted that the Civil Rights Act of 1870 was considered the first enforcement act (entitled "An Act to enforce the Right of Citizens of the United States to vote in the Several States of the Union and for other Purposes") and the Civil Rights Act of 1871 considered the second enforcement act; this would support the tendency to view them together, as the members of the same class "any law providing for equal rights."

9 Presumably the majority would have us believe that the use of the disjunctive "or" in what is now 28 U. S. C. 1343, implies that the 1875 Congress perceived a sharp distinction between on the one hand, "rights secured by the Constitution," and, on the other hand, "rights secured by any law providing for equal rights," and that a Congress that set up two different categories would not view the Constitution, or any part of it, as being a "law providing for equal rights." This does not, however, meet the argument that §1983 is a "law providing for equal rights." Moreover, the use of the disjunctive does not necessarily imply two mutually exclusive categories for example, the Equal Protection Clause, concededly a law providing for equal rights, might well fall into both categories. Instead, the use of the disjunctive suggests to me that some legislators believed that some of the civil rights acts have guaranteed

Secondly, in determining how "great a substantive change" would be wrought, some insight into the 1875 legislators' view of proper federal-state relations is necessary, if any reliance is to be placed on legislative history. The legislators of the Reconstruction Era saw the federal courts as a necessary and perhaps the most appropriate

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more rights than the Constitution, or that in the future other statutes, such as the fourth Civil Rights Act, Act of March 1, 1875, §3, 18 Stat. 335, 336 would do so, or that some legislators believed that not every part of the Constitution guaranteeing rights, privileges and immunities is also "a law providing for equal rights." Appellants could make this latter point with little damage to a position that maintains that the Equal Protection Clause or the Fourteenth Amendment as a whole is a law providing for equal rights. For certain of the "basic guarantees," such as the prohibition against states passing "any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts" (Article I, section 10, clause 1), have little relation to the Equal Protection Clause, or the Fourteenth Amendment, although the Civil War Amendments contributed to the demise of the *Dred Scott* decision by making it abundantly clear that the freedmen were "citizens" of the United States and entitled to all the rights, privileges and immunities of such citizens.

This last point could perhaps serve as a source of distinguishing, if one deems it necessary to do so, the passing remarks of Justice Harlan in *Gibson* v. *Mississippi*, 162 U. S. 565 (1896), a case involving a claimed violation of the prohibition against *ex post facto* laws. There is a more direct relationship to the Fourteenth Amendment if some petitioners claimed that they were exercising a "liberty" protected by that Amendment to pressure the state to cease denying its Negro citizens "the equal protection of the laws" guaranteed by that Amendment.

On the issue of case authority invoked by the majority, I might add that it is difficult to see how *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943) provides "inferentially" or otherwise, "strong" authority for the remand of all these petitions, even ignoring the fact that that case involved "freedom of speech and of religion" and that case need not be removable under §1443(2) on what I understand to be "the view of the appellants here." The possibility of remand was not considered in the briefs or opinions, and I venture to say that Justices are not so omniscient that it would be fair for the majority to presume that they considered the possibility of removal under §1443(2) when they held that a federal court could not enjoin a state prosecution; just as there is a difference between enjoining police officers under 42 U. S. C. §1983 and removal under 28 U. S. C. §1443, there is a difference between removing a prosecution to another forum and enjoining that prosecution.

forum for the protection of federal rights. This conception was expressed in, for example, the Act of April 9, 1866, 14 Stat. 27, §3 of which was the first step toward the present §1443; the Act of February 5, 1867, 14 Stat. 385, the federal habeas corpus statute (now 28 U. S. C. §2241 (c)(3)) providing a federal forum to try a state prisoner's claim that he is being deprived of liberty in violation of the Constitution, see *Fay* v. *Noia*, 372 U. S. 391 (1963); the Act of April 20, 1871, 17 Stat. 13, the antecedent to §§1983 and 1985 giving the federal courts original jurisdiction to remedy, either in a civil or criminal action, claimed violations of federal constitutional rights, see *Monroe* v. *Pape*, 365 U. S. 167 (1961); and the Judiciary Act of March 3, 1875, §1, 18 Stat. 470, giving the federal courts original (28 U. S. C. §1331) and removal (28 U. S. C. §1441) jurisdiction of civil actions where "the decision depends upon the determination of" a federal question, *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 201 (1921). Conceivably legislators today might well wish to exclude the Fourteenth Amendment from the ambit of the §1443(2) category of "any law providing for equal rights," but that has little bearing on what the legislators of 1875 "intended" and it is hardly a jurisdiction for us to interpret the past product of Congress to achieve that result. Given the fact that after the Reconstruction Era non-majority power blocs have long been able to prevent Congress from acting, and even deliberating, to secure and protect civil rights, it would not be unfair for us now to await for Congress itself to decide through the constitutionally proscribed procedures whether it wishes to restrict one of the significant statutory gains of the Reconstruction Era. I would presume, however, that the Congress that enacted Title IX of the Civil Rights Act in order to make meaningful the right to remove in civil

rights cases would not be so inclined, to say the least.[10] This Congress did not expect us to limit subdivision 2 of §1443 as *Virginia* v. *Rives*, 100 U. S. 313 (1880), *Neal* v. *Delaware*, 103 U. S. 370 (1880) and *Kentucky* v. *Powers*, 201 U. S. 1 (1906) had limited subdivision 1.

I would vacate the orders of remand, return the cases to the district courts, afford appellants an opportunity to remand their removal petitions, and have the district courts conduct full hearings on adequate pleadings to determine whether any of petitioners were being prosecuted for acts done under color of authority derived from any law providing for equal rights.

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10 See, *e.g.*, the statement of one opponent of the Civil Rights Act of 1964: "The catalogue of lawsuits which title IX would affect incorporates, among others, all suits in which the defendant might invoke the Equal Protection Clause of the 14th Amendment. The list is too long to itemize." 1964 U. S. Code, Cong. & Admin. News 1850.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MILTON A. GALAMISON, et al.,

Petitioners-Appellants, Nos. 29166-72

-against-

CITY OF NEW YORK

Respondent-Appellee.

WILLIAM DEUTSCH, et al.,

Petitioners-Appellants, Nos. 29173-5

-against-

CITY OF NEW YORK,

Respondent-Appellee.

SUPPLEMENTARY MEMORANDUM OF LAW ON BEHALF OF APPELLANTS

At the conclusion of the oral argument on Friday, October 2, 1964, the Court asked for additional briefs addressed primarily to the legislative history of Title IX of the Civil Rights Act of 1964. Because of the nature of the argument and the Court's questions, counsel for appellants are taking the liberty of expanding their original brief somewhat in order to clarify some of the issues involved in this appeal.

POINT I

THE LEGISLATIVE HISTORY SUPPORTS APPELLANTS' CONTENTION THAT THE DECISION BELOW SHOULD BE REVERSED

The language of Title IX, Civil Rights Act of 1964, pertaining to the appealability of removal orders did not appear in the original version of H.R. 7152 which was sent to the Congress by the Administration on June 19, 1963. In addition, it did not appear in any of the alternative bills submitted by individual members of the Congress at about the same time. (Hearings before Subcommittee No. 5 of the Committee on the Judiciary, 88th Congress, 1st Session, on Miscellaneous Purposes Regarding the Civil Rights of Persons Within the Jurisdiction of the United States, hereafter cited as "Hearings", P. 1910).

However, a number of persons who testified before the subcommittee which was considering H.R. 7152 and related bills, strenuously urged its members to consider the inclusion of language pertaining to the appealability of civil rights remand orders.

On July 17, 1963, Benjamin E. Smith, a prominent civil rights attorney from New Orleans, Louisiana, urged the subcommittee to consider the inclusion of such language. (Hearings, P. 1818) On that same day, William L. Higgs, a former Mississippi lawyer and the director of the Washington Human Rights Project, submitted to the subcommittee an evaluation of H.R. 7152 which

suggested an amendment of then 28 U.S.C. 1447(d) to make remand orders in civil rights removals expressly appealable. (Hearings, P. 1829)

The next day, William M. Kunstler, one of appellants' counsel, appeared before the subcommittee and strongly recommended the adoption of such a provision. During this discussion, the following colloquy took place between the witness and Chairman Emanuel Celler:

THE CHAIRMAN: I think the idea you suggest about courts is a good idea, but I wonder whether or not it would be wise to put it, since it is so highly controversial, into a bill of this character? It might be the reason why we would have to pull an awful load if we had it in a bill.

MR. KUNSTLER: You mean the removal aspect?

THE CHAIRMAN: It is extremely difficult because that would give rise to tremendous controversy. We have enough controversy.

MR. KUNSTLER: I would agree with you on that and I would say this: If it isn't in the bill, it ought to be considered at least separately. I think it is an extremely important point. It may become academic, depending on what the fourth circuit does.

MR. FOLEY: At that time--I think perhaps it would have been better to treat the amendment of 1447 as a separate issue from the question of civil rights. I think we would stand a better chance of seeing the law enacted along the lines we are discussing here as opposed to the judicial question of procedure, rather than put it into a civil rights structure.

MR. KUNSTLER: I would like permission to submit to you the briefs that we filed and the Government filed in the Danville removal cases. They do go back through the history of the bill, itself, and of the removal of the appeal statute, for your own edification, whatever use you want to put it to.

MR. FOLEY: When is that case going to be heard?

MR. KUNSTLER: I understand in Baltimore--no, I am not sure --on September 23 before the nine judges. Judge Sobeloff has set it down for the first case of the term.

THE CHAIRMAN: Thank you very much, Kunstler.

MR. KUNSTLER: Thank you, Mr. Chairman.

THE CHAIRMAN: It would be interesting if you would care to submit us a brief on this question of removal.

MR. KUNSTLER: I am going to submit you the briefs that are already in existence both by the Government and the plaintiff's attorneys.

MR. KASTENMEIER: As an addenda, might I say that I appreciate what the witness has said and I would like to express a mild dissent from the chairman or counsel's views on the need for something on removal being in this bill. I still have hopes that at least this committee will consider it and that we can do something about it and I appreciate the discussion on it of the witness.

MR. LINDSAY: You have done a good job, excellent job, very helpful and very constructive.

MR. KUNSTLER: Thank you very much.

THE CHAIRMAN: I want to say that we undoubtedly would consider this proposal. I did not make the statement that I would not consider it. I certainly would consider it.

MR. KASTENMEIER: My dissent goes procedurally to the motion that it should be introduced separately and keep separate civil rights matters all as did the public defender bill. It is only if it gets into a civil rights bill that it has any chance of survival I am convinced. Of course, I am talking about tactics. For this reason I hope the committee hasn't given up on this ..."

Hearings, Pp. 1910-11

On July 19, 1963, John D. Fauntleroy, Legislative Committee American Veterans Committee, strongly urged the inclusion of appealability language in Section 1447 as far as civil rights removals were concerned. "Another vital area in the civil rights struggle is not covered in the bill at all," he testified. "The question of removal of criminal prosecutions or civil actions of a discriminatory nature from the State to the Federal Courts." (Hearings, P. 1996) He, too, recommended, in somewhat different language, the making of such remand orders expressly appealable. See also statement, American Veterans Committee, Hearings, Pp. 1962-63.

On July 31, 1963, the Reverend Walter E. Fauntroy, testifying on behalf of Dr. Martin Luther King, Jr. and the Southern Christian Leadership Conference, urged the enactment of Title IX. In a rather full statement, Reverend Fauntroy testified as follows:

"The approach is to amend the existing civil rights removal statute, which has a 97-year history of nonuse. The statute allows removal in two generic situations: when a defendant cannot obtain a fair trial in a State or local court, or when a defendant is being prosecuted for an act which he performed under constitutional authority, such as conducting voter registration classes, registering to vote or speaking or walking for freedom.

continued ...

"The approach has two aspects: (a) A manifesto declaring that removal shall be liberally sustained (an early line of Supreme Court cases had construed the statute restrictively); (b) a clause making reviewable an order of remand (which transfers the case back to the State court). The remand order has not been reviewable by appeal since 1887 and not reviewable at all since 1948. Thus, the early, narrow Supreme Court interpretation was frozen into the statute, and southern district judges are given carte blanche control."

Hearings, P. 2358

As a result of such testimony and his own thorough investigation, Hon. Robert W. Kastenmeier, a member of the subcommittee, introduced a proposal, among others, that 28 U.S.C. 1447(d) be amended to its present form. This language was retained throughout and ultimately became law with the passage and approval by the President of the present legislation on July 2, 1964. (P.L. 88-352)

On November 20, 1963, the Committee on the Judiciary submitted Report No. 914 to the Committee of the Whole House to accompany H.R. 7152. In it, Title IX was criticized by several dissenting members of the Committee. Hon. George Meader (Michigan) complained that the proposal had not been given sufficient attention by either the subcommittee or the full committee. (The Civil Rights Act of 1964, BNA Operations Manual, BNA Incorporated, Washington, D.C., hereinafter cited as BNA)

The minority report, which was signed by six southern congressmen, criticized the proposed change as "the most flagrant and dangerous departure from accepted rules of civil procedure..." (BNA, P. 201) and "a radical departure from accepted rules of

civil procedure ..." (BNA, P. 222) Hons. William Poff (Virginia) and William C. Cramer (Florida) issued separate minority views in which they maintained that "the catalog of lawsuits which Title IX would affect incorporates among others, all suits in which the defendants might invoke the equal protection clause of the 14th Amendment. The list is too long to itemize." (BNA,P.245)

In his additional individual views, Mr. Cramer indicated that the Attorney General had appeared before the full committee on October 3, 1963, and "refused to recommend deletion of the following:

* * * * * *

7. Appeal on remand order of only civil rights cases."
(BNA, P. 250)

This provision was referred to in Part 2 of House Report No. 914 (December 2, 1963) as "a useful provision which merits support." The seven signatories urged that the "inability to appeal remand orders [In civil rights removals] has effectively barred citizens from obtaining a redress to their denial of civil rights." (BNA, P. 287)

The Dirksen-Mansfield-Kuchel-Humphrey bill which was substituted for the House bill in the Senate and then accepted by the House retained the identical language of Title IX as it appeared in the House bill.

It is obvious that the Congress (1) was fully familiar with the claimed benefits and defects of the first sentence of Title IX and (2) that it wished to enact it into law. The absence of extended debate on the issue cannot be construed as a lack of care. On the contrary, there was a significant amount of testimonial and evidentiary material before both the subcommittee and the full committee as well as enough strident opposition to make itself felt. The mere fact that, in such a highly controversial bill as the Civil Rights Act of 1964, whose every provision was minutely scrutinized by both the members of the Congress and vitally interested individuals and organizations, any provision was ultimately enacted into law speaks eloquently for the congressional emphasis.

With particular reference to the appealability of civil rights remand orders, Congress was amply warned that federal court dockets would increase (BNA, 245), that state-federal relationships might be imperiled (BNA, 201), that criminal prosecutions in state courts might be delayed (BNA, 201) that Title IX was "a radical departure" (BNA, 222). Hon. William Tuck (Virginia) voiced many of these objections and more on the floor of the House when he bitterly condemned Title IX. (Congressional Record, 88th Cong. 2d Sess.,V.110,No.18,pp.1517-18.) Yet Congress considered each objection to be non-meritorious and the provision was retained.

The continuing importance Congress attached to the appealability of civil rights removal cases is readily apparent in the statutory history of 28 U.S.C. 1443 and 1447(d). A brief summary will illustrate that Congress has always considered civil rights removals so important that it retained the appealability of such removal orders even while destroying it insofar as non-civil rights cases were concerned. (See also opinion in CORE v. Clinton, No. 20960, CCA 5, decided September 22, 1964, copies of which were previously submitted to this Court.)

Section 1443 is based upon Title 28 U.S.C., 1940 ed. Section 74, 36 Stat. 1096. This section is in turn derived from Revised Statute 641. Revised Statute 641 was first enacted as one of the provisions of the Civil Rights Bill of 1866, 14 Stat. at L. 27, chap. 31, Sect. 1. This Bill, first passed prior to the adoption of the Fourteenth Amendment and later reenacted under the authority of that Amendment, was the heart of the overall Congressional "design to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it." Strauder v. West Virginia, 100 U.S. 303.

At the time of the enactment of the original predecessor of 1443, appellate review of any order of the Circuit Court, the then original federal court, lay directly to the Supreme Court. However, the general appellate jurisdiction of the Supreme Court by way of appeal or writ of error was then limited to review of

final judgments. Insurance Co. v. Comstock, 16 Wall. 270, 21 L. Ed. 498. Review of an order remanding a case removed to the federal courts pursuant to the Civil Rights Bill of 1866 was therefore available only by way of a petition for mandamus. Chicago and Alton R.R. Co. v. Wiswall, 23 Wall. 507, 23 L. Ed. 103.

The Act of March 3, 1875, chap. 137, sect. 5, 18 Stat. 470, 472, provided for the review of an order remanding to state courts by way of appeal or writ of error. This statute applied to all removal statutes, including Rev. Stat. 641, the Civil Rights removal provisions.

The Act of March 3, 1887, 24 Stat. 552, 553 (corrected by Act of August 13, 1888, 25 Stat. 433, 434) repealed the provisions of the 1875 statute and generally stated in respect to the removal statutes, "no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." This provision was later reenacted in Title 28 U.S.C. 71, 1940 ed., and later substantially embodied in present 28 U.S.C. 1447(d).

However, the Civil Rights Removal Statute, as differentiated from the general removal statutes, was specifically excluded from the limiting effect of the 1887-88 Acts. Section 5 of the 1887-88 Acts enacted a savings clause in respect to Rev.

Stat. 641, the Civil Rights removal provisions. Together with other Civil Rights provisions, the savings clause provided that:

> "Nothing in this section [the general repeal of the 1875 Act], shall be held, deemed or construed to repeal or affect any jurisdiction or right mentioned in Section 641."

This savings clause contained in Section 5 was not repealed by the enactment of the Judicial Code even though not specifically repeated in the codification. Gay v. Ruff, 292 U.S. 25, 29.

The Congressional concern for the Civil Rights Removal Statute is perfectly understandable. While the general removal statutes dealt solely with questions of a convenient forum for the litigation of essentially private rights, the Civil Rights Removal Statutes were originally enacted to vindicate broad public rights of a pressing national importance. Since the purpose of the 1887 Act was generally to restrict the utilization of the federal courts for removal proceedings of a primarily private nature it became important for Congress to make it quite clear that this restriction did not apply where removal touched problems of a fundamentally different nature, the vindication of the fundamental rights of freedom and equality guaranteed to the Negro by the Fourteenth Amendment. This purpose Congress accomplished through the savings clause in Section 5 of the 1887 Act.

Section 5 therefore exempted from the generally restrictive impact of the legislation the jurisdiction vested in the federal courts by the Civil Rights Removal Statutes. The plain words of the savings clause require a construction of the 1887 Act in such a manner as to refrain from affecting or limiting any of the rights involved in the invocation of federal jurisdiction provided for in the original provisions of the Civil Rights Bill of 1866 and subsequently incorporated in 641 of the Revised Statutes.

It is highly significant in this respect that whatever original restrictions existed upon the right to appeal an order of remand were purely of a procedural nature. There were no policy considerations militating against a right to appellate review of such orders. The only considerations were technical in nature and went to the form of the review, rather than to the substance of the review. Chicago and Alton R.R. Co. v. Wiswall, supra. This is understandable. A Congress which viewed the Civil Rights Bill of 1866 as a great charter of liberty designed to protect the newly emancipated race, The Civil Rights Cases, 109 U.S. 3 27 L. Ed. 385, 3 Sup. Ct. 18 (1883), would hardly have tolerated a situation in which the important right to turn to the federal courts for protection could be virtually nullified by a denial of any right to review an order remanding proceedings to the state courts.

In 1866 the Congress viewed the Civil Rights Removal Statute as an essential ingredient in a program of full enforcement of the sweeping guarantees of liberty and equality enunciated in the Fourteenth Amendment. Tennessee v. Davis, 100 U.S. 257, 25 L. Ed. 648; Strauder v. West Virginia, supra. It is axiomatic that any fundamental right essential to the protection of such basic constitutional aims as equality and freedom would hardly be left to the sole unreviewable authority of a single federal judge, himself more than possibly influenced by the very passions and prejudices which required resort to the right to removal in the first instance.

From the first years of its enactment this legislation, destined to play an essential role in the overall scheme of Congressional enforcement of the Fourteenth Amendment, was protected by the availability of appellate supervision through the high prerogative Writ of Mandamus. From 1875 until 1887 this original form of appellate review was supplemented by statutory appeal and writs of error. When the Congress in 1887 came to the conclusion that in the many instances of non-civil rights removals based upon diversity of citizenship or the presence of a federal question, federal jurisdiction should be limited by eliminating appellate review of an order of remand, it specifically exempted the Civil Rights Removal Statute from this thrust. In doing this the Congress was reasserting again the high public importance it attached to the preservation of the civil rights removal jurisdiction.

It is within the spirit of the original Act of 1866 and the savings clause of 1887 that the present statutes must be construed. The savings clause in Section 5 of the Act of 1887 preserved the substance of appellate review originally available by way of mandamus in orders of remand in removal cases arising under the Civil Rights Removal Statute. Accordingly Section 1443 must be presently construed as being regarded by Congress as an important and significant statute and should be liberally interpreted by the courts.

POINT II

REMOVAL WAS PROPER UNDER SUBSECTION (2) OF 28 U.S. 1443 AND THE DISTRICT COURT HAD JURISDICTION TO HEAR AND DECIDE THE CASES

The petitions for removal meet the requirements for federal jurisdiction under subsection (2) of 28 U.S.C. 1443. Appellants claim that, under color of authority, they were lawfully protesting the denial of the equal protection of the laws to Negro citizens of the City and State of New York.

Appellants were exercising their First Amendment right to assemble, to petition, and to otherwise protest for a redress of grievances. Their objective was to secure the desegregation of public facilities and the elimination of racial discrimination in the City of New York. These citizens were petitioning the City

under color of authority of the Fourteenth Amendment for that equal protection of the laws which the Supreme Court has time after time reiterated the states must guarantee to all citizens, Brown v. Board of Education, 347 U.S. 483.

The "law" from which their authority to "act" was derived is the Constitution of the United States and in particular the First and Fourteenth Amendments. The Constitution is a "law" of the land within the meaning of the federal statutes. Standard Computing Scale Co. v. Farrell, 249 U.S. 571, 577 (1919); In re Neagle, 135 U.S. 1 (1889); Williams v. Bruffy, 96 U.S. 176, 183 (1877); Stoffil v. W. J. McCahan Sugar Ref. Co., 35 F. 2d 602, 630 (E.D. Pa. 1929). The Constitution is thus a law providing for "equal rights" within the meaning of Section 1443(2). Moreover, appellants acted under color of the numerous federal statutes such as 18 U.S.C. 241, 242; 28 U.S.C. 1343; 42 U.S.C. 1985, 1986, 1987, 1988.

The plain words of Section 1443 (2) merely require a showing of a "color" of authority derived from a law providing for equal rights. It does not require either a showing of express authority or the absolute proof of such authority. If citizens colorably act under such authority this is sufficient within the meaning of the statute. See Whittington v. Johnston, 201 F.2d 810 (CA 5). It is clear that the gravamen of the acts of the appellants was the exercise of First Amendment rights to free speech, assembly and the right to petition for redress of grievances. Respondents

really do not contest that these acts were engaged in under "color" of the Constitution. They argue in essence that under the circumstances of the situation these rights ought not to be constitutionally protected. This misconceives the jurisdictional problem. As long as the acts were undertaken "under color of authority derived from" the Constitution the prosecutions are removable to the federal court under Section 1443 (2). Respondents had the burden of showing that the acts for which appellants were prosecuted were not performed under color of authority of laws providing for equal rights. Any contention that they did not think this was a "proper" way to achieve constitutional ends is of course not germane to the jurisdictional issue. Nor is it relevant that acts consisting of the peaceful exercise of constitutional rights might have engendered hostility or even acts of violence on the part of others. Cf. Terminiello v. City of Chicago, 337 U.S. 1, or that the acts might have had such secondary effects as littering the streets or obstructing traffic. Cf. Cantwell v. Connecticut, 310 U.S. 296; Marsh v. Alabama, 326 U.S. 501; Tucker v. Texas, 326 U.S. 517; Thomas v. Collins, 323 U.S. 516; Martin v. Struthers, 319 U.S. 141. The only relevant question is whether the acts undertaken and for which the appellants are being prosecuted were undertaken under "color" of constitutional or statutory authority. Once this is established the statute is clear, the prosecution may be removed. The actual question of whether the acts are

protected or may be punished is only then placed in issue in the subsequent trials. The jurisdictional issue is solely the presence of colorable authority.

There appears to be only one decided case dealing directly with Section 1443 (2), Hodgson v. Millward, 12 Fed. Cases No. 6, 568, 3 Grant Cases 418 (C.C. Pa. 1863). This case concretely illustrates the meaning of "color of authority". A federal officer had entered Millward's land under color of a Presidential order. Though there were doubts that the order was formally correct and whether the President would properly issue it, nevertheless removal was allowed. The validity of the order, the court held, "constitutes the very question to be tried and determined [in the federal court]. The order was color of authority, whether the substance [of authority] existed or not".

Similarly here the question as to whether the acts of appellants were in fact protected against prosecution by the Constitution "constitutes the very question to be tried and determined" in the federal court. Sufficient to ground removal is the fact that the acts of appellants were patently carried out under "color" of the First and Fourteenth Amendments whether the "substance" of these rights "existed or not".

Any other interpretation of Section 1443 (2) would render it a nullity. Congress has granted the federal courts jurisdiction in these situations precisely so that these issues, exclusively

federal constitutional questions, may be litigated and decided if desired in the most appropriate forum, a Federal District Court. Thus it is sufficient for purposes of removal to show that appellants were claiming or acting under color of constitutional or federal statutory rights. The problems of balancing First Amendment rights against asserted interests of community peace and welfare are not before a District Court on a motion to remand. The problem of whether or not the exercise of constitutional rights will be protected, whether appellants' exercise of First Amendment rights falls within the orbit of constitutional protection, cf. American Communications Association v. Douds, 339 U.S. 382, must be decided later. To sustain removal it needs merely to be shown that appellants were in fact attempting to exercise constitutionally sanctioned rights.

Under the plain words of 1443 (2) appellants have more than established jurisdiction. The Supreme Court has not limited in any way the clear and unequivocal words of this statute.

The older decisions of the Supreme Court construing Section 1443 relate solely to an interpretation of subsection (1). Thus such cases construing Section 1443 as Strauder v. W. Virginia, 100 U.S. 303 (1879); Virginia v. Rives, 100 U.S. 313 (1879); Bush v. Kentucky, 107 U.S. 110 (1882); Smith v. Mississippi, 162 U.S. 592 (1896); Murray v. Mississippi, 163 U.S. 101 (1896); Williams v. Mississippi, 170 U.S. 213 (1898); Neal v. Delaware, 103 U.S. 370 (1880); Kentucky v. Powers, 201 U.S. 1 (1906), all

relate exclusively with subsection (1). They raise solely the problem of the inability to obtain a fair trial. None of these cases involved a petitioner claiming that the acts for which he is prosecuted were done under color of authority of a law providing for equal rights. Appellants in these cases had allegedly committed criminal acts such as murder or rape and were raising the issue of whether or not they could get a fair trial in the State court. The holdings in these cases in no way involved subsection (2). The issue of whether or not appellants will be denied the right to a fair trial in the State court is solely a subsection (1) problem. It does not affect subsection (2) at all.

Similarly all recent District Court opinions deal only with the ability to obtain a fair trial question, exclusively a subsection (1) issue. Cf. Texas v. Dorris, 165 F. Supp. 738; Llano del Rio v. Schmidt, 84 F. Supp. 336; Hill v. Pa., 183 F. Supp. 126; Rand v. Arkansas, 191 F. Supp. 20. In the same way North Carolina v. Jackson, 135 F. Supp. 682, is relevant only to an interpretation of subsection (1). As the Court pointed out in the Jackson case, "the sole basis for the removal stated in defendant's petition" was the allegation that defendant was threatened with the deprival of a fair trial in the State court.

The Supreme Court and District Court cases thus relate solely to a consideration as to under what circumstances it can properly be asserted with any certainty that a defendant will be deprived of a fair trial in a State court. Cf. Virginia v. Rives

and cases cited supra. These considerations are of course utterly irrelevant to any interpretation of subsection (2). This section does not involve any question of the availability of a fair trial but solely rests upon the character of the acts for which a defendant has been prosecuted. There can be no speculation about this question. Cf. Virginia v. Rives, supra. The jurisdiction of the Federal Court here does not rest, as in a subsection (1) case, upon an estimate of what may happen in the future in a state court, but upon what has already occurred. It is for this reason that the cases interpreting subsection (1) have no relevance to an interpretation of subsection (2). The statute comes before this Court unrestricted by any case law gloss. The plain words govern. The District Court was required to deny the motion to remand.

In summary, the present appeals provide the Court with a classic subsection (2) situation. Congress clearly intended that where persons are being prosecuted for exercising their constitutional rights these persons should be granted the privilege of having their prosecutions litigated in a federal forum. Appellants here are being prosecuted for constitutionally seeking their equal rights. The orders of remand disregard the statute and plain intent of Congress.

The serious impact of the questions here presented both upon the national and local situation is well stated in the memorandum setting forth the interest of the United States in Baines v. Danville, Western District of Virginia.

POINT III

ALL DEFECTS, IF ANY, AS TO THE FORM OR CONTENTS OF THE REMOVAL PETITIONS HAVE BEEN WAIVED BY APPELLEES

Prior to the argument before this Court appellees expressly waived all defects, if any, as to the form or contents of the removal petitions filed below. As the Court will remember, one of appellees' counsel so informed it at the argument and stated unequivocally that the reason for appellees' waiver was to enable this Court to reach a decision on the merits rather than one based upon a technicality. As he indicated, not only were appellees interested in a final determination on the merits to guide them in future cases, but they wished to avoid a technical decision which would, at best, result in the filing of new removal petitions and further inconvenience to both this Court and the parties. Appellants wholeheartedly join in this rationale and although they feel most strongly that the removal petitions are sufficient themselves under the federal rules of pleading, they urge this Court to consider only the substantive merits of the appeal.

CONCLUSION

Appellants respectfully urge that the orders of the courts below remanding these criminal prosecutions to the Criminal Court of the City of New York be reversed and these cases set for trial

in the appropriate district courts or, in the alternative, that they be remanded to the appropriate district courts for full hearings.

Respectfully submitted,

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— make file
Salamon v
NYC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FRANCES CRAYTON et al.,

Appellants-Petitioners

- against -

THE CITY OF NEW YORK,

Appellee - Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

FRANK S. HOGAN

District Attorney
New York County

NOTE: This brief is being submitted on behalf of the Respondent in all cases argued on October 2, 1964 including those handled by the District Attorneys of New York, Bronx and Queens Counties and the Attorney General of the State of New York.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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FRANCES CRAYTON et. al., :

Appellants-Petitioners :

:

- against -

:

THE CITY OF NEW YORK, :

Appellee - Respondent. :

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Respondent's Supplemental Brief

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Honorable John M. Cannella, presiding) dated August 4, 1964, granting respondent's motion to remand this case to the State courts. Briefs were submitted and argument heard on October 2, 1964. At that time this court requested supplemental briefs on the legislative history of Section 901 of the Civil Rights Act of 1964.

POINT I

THIS SECTION WAS ENACTED TO PERMIT THE COURTS TO RE-EXAMINE THE HOLDING THAT 28 U. S. C. 1443 APPLIES ONLY WHEN THERE IS A STATE CONSTITUTION OR STATUTE THAT DENIES A PERSON HIS RIGHTS.

For a section of a law that was enacted only after extensive hearings in the House Judiciary Committee and after a filibuster in the Senate the legislative history is surprisingly sparse. Such history as there is however is very clear, and since some of that history was made for the avowed intent of creating legislative history, there can be no doubt as to the intent of Congress in enacting Section 901.

The clear intent of Congress was to avoid examining Section 1443 and to throw that job to the courts.

Several mentions were made of the line of decisions that terminated in Kentucky v. Powers, 201 U. S. 1 (1906) which held that removal was proper only when a state constitution or statute deprived the defendant of his rights. It is apparent that Congress wished the courts to review these decisions but did not wish to do the job itself.

It should be noted that the statute that was finally passed was a Senate substitute for the bill passed by the House. However, Section 901 was the same in both versions. Unfortunately, this Section was added after the subcommittee hearings, but there was discussion of a somewhat different proposed section which might lend a little light.

The clearest statement of intent was made by Senator Dodd who stated that he was discussing the section specifically lest the question of legislative intent be raised. Senator Dodd said that the cases interpreting the section that is now 28 U. S. C. 1443 made erroneous interpretations of the Congressional intent behind the Acts of 1866 (which includes the predecessor of Section 1443). He went on to say:

> "It is particularlyimportant it seems to me, that the right to a fair trial free from racial hostility and antagonism should be guaranteed. This is what the Congress of 1866 tried to do. This is what the removal statute will do if properly construed." 110 Congressional Record 6739 (1964).

Senator Dodd went on to say that Congress was rejecting the idea of specifying what kinds of cases should be removed because this would involve technical difficulties in

drafting and should be handled on a case by case basis.

Senator Humphrey, floor manager for the bill, added his voice to the same effect saying that the cases appear

> "to hold that the right of removal is limited to situations in which a State statute or constitution on its face denies equal rights. However the real problem at present is not a statute which is on its face unconstitutional; it is the unconstitutional application of a statute. When a State statute has been unconstitutionally applied, most Federal district judges presently believe themselves bound by these old decisions and remand attempted removals to the State courts. Under present law such a remand is unappealable. As a consequence, the right to remove civil rights cases is of very little use. Enactment of title IX will give the appellate courts an opportunity to re-examine this question." 110 Congressional Record 6331 (1964).

In the House, Representative Kastenmeier spoke to the same effect saying:

> "we are only asking that the law, frozen as it has been for almost sixty years so that the civil rights provisions of removal are almost useless, be reviewed, the power of appeal from the district court orders of removal be granted, and also, incidentally that the Court of Appeals be authorized to reinterpret these laws. It would seem that under reinterpretation of Section 1443 cases involving State criminal prosecution brought to intimidate the petitioner, cases involving such community hostility that a fair trial in State

> or local courts is unlikely or impossible, and other such cases as set forth certain conditions which would seem likely or certain to preclude a fair trial, might now well be construed to be within the scope of said section. If so, once again we will breathe life into the Civil Rights Acts of 1866 and give meaning to the purpose intended." 110 Congressional Record 2675 (1964).

From the foregoing it is absolutely clear that the intent of Congress was to allow the courts to re-examine the Kentucky v. Powers, 201 U. S. 1 (1906) line of decisions, and to ensure that cases will be removed when the defendant cannot obtain a fair trial. During the oral argument, William Kunstler, Esq., counsel for petioners withdrew his appeal under subsection 1 of Section 1443. Therefore, the legislative history as set out above does not help him since obviously it all applies to subsection 1. This case should be affirmed in any case since it is apparent that Congress was concerned with the difficulty of getting a fair trial in some State courts. Clearly that is not a problem in this State, and petitioners have, of course, failed to show that it is.

POINT II

PETITIONERS DID NOT ACT UNDER "COLOR OF AUTHORITY" WITHIN THE MEANING OF THE SECTION.

Although I read approximately 3000 pages of debate in the Congressional Record and the transcripts of all committee and subcommittee hearings, I found, aside from one or two times in which Section 1443 was recited verbatim, only one reference specifically to subsection 2 of Section 1443. This was by Rev. Walter E. Fauntroy of the Southern Christian Leadership Conference who said:

> "The statute allows removal in two generic situations: when a defendant cannot obtain a fair trial in a State or local court, or when a defendant is being prosecuted for an act which he performed under constitutional authority, such as conducting voter registration classes, registering to vote or speaking or walking for freedom." Hearings before Subcommittee No. 5 of the Committee on the Judiciary of the House of Representatives. 88th Congress, 1st Session. Serial No. 4, Part III, page 2358.

The only recent or pending case that would be affected by Section 901 that was discussed in the hearings was Baines

v. City of Danville 33 Law Week 2124, — F. 2d — (1964) rehearing granted, — F. 2d — (1964). There are several mentions that an appeal would have been disirable in that case but the question of whether defendants were acting under "color of authority" was not discussed.

The article by Professor Louis Lusky, 63 Columbia Law Review 1163 (1963), is similar to the discussions in Congress in that it talks about the need to allow appeals in civil rights cases, mentions the failure of state courts to give fair trials, and suggests that removal should be allowed when a pattern of discrimination has been shown. It does not discuss the meaning of "color of authority."

The meaning of the words "color of authority" can best be seen if the statute is first read as if the words "color of" were not present. Then it would be clear that the defendant must have actual, specific authority, such as a warrant, before his "act" came under Section 1443 (2). Then if the warrant were in fact invalid, if, in other words, there were no authority, then the case would not be removable. But apparently to avoid such technicalities Congress made cases removable if there were just "color of authority," so that if the warrant were in

fact invalid the case would still be removable. Hodgson v. Millward, 12 Fed. Cases No. 6, 568, 3 Grant Cases 418 (C. C. Pa. 1863), as set forth in petitioners' supplemental brief, indicates that an invalid warrant is sufficient "color of authority" for removal.

But Hodgson and the relatively restricted meaning that the precise language of the statute seem to call for are far different from the instant cases. In these cases, petitioners chained themselves to bannisters in City Hall, lay down on subway tracks and did similar acts completely unrelated to any authority. Certainly the First Amendment does not permit the blocking of a railway line.

In Hodgson the petitioner was a Federal officer. Section 641 clearly indicates that only Federal officers, or those other persons similarly situated even though not technically officers, can remove for acts done under color of authority. Since Section 1443 is merely a codification of Section 641 the same meaning should be given to it.

POINT III

THE PETITION FAILED TO STATE ANY FACTS

Respondent stands by its argument that the petition is invalid in that it fails to state facts. The concession made by Mr. Ehrlich on oral argument should be limited to its terms, to wit: naming the "City of New York" as respondent instead of "The People of the State of New York," and failure to make timely service of answering papers in the District Court.

CONCLUSION

Since Congress passed Section 901 solely with the rule of Kentucky v. Powers, 201 U. S. 1 (1906) in mind and since petitioners withdrew their argument under Section 1443 (1) to which that rule applies, and since petitioners failed to state sufficient facts under Section 1443 (2), and since they would not have a case even had they alleged facts, the decision below should be affirmed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

John A. K. Bradley
Assistant District Attorney
Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

v.

MILTON A. GALAMISON, et al.,

Appellants.

Nos. 29166-29175

BEFORE:

KAUFMAN and MARSHALL, Circuit Judges.

MOTION FOR EXTENSION OF STAY OF MANDATE

John E. Silberberg, Esq.
One of the Attorneys for Appellants

Motion granted to the extent that the mandate is stayed until March 15, 1965, and thereafter if, on or before that date, there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States, as provided in Rule 28c(2) of this Court.

March 5, 1965

I.R.K.

T.M. (per I.R.K.)
U.S.C.JJ.

UNITED STATES COURT OF APPEALS
For the Second Circuit

FEB 10 Rec'd

- - - - - - - - - - - - - - - - - - -

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

v.

MILTON A. GALAMISON, et al.,

Appellants.

- - - - - - - - - - - - - - - - - - -

Before FRIENDLY, KAUFMAN and MARSHALL, Circuit Judges.

Motion for stay of mandate

John E. Silverberg, One of the
Attorneys for Appellants.

The mandate is stayed for thirty days from the date of this order and thereafter if, within said period, there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States, as provided in Rule 28c(2) of this Court.

Henry J. Friendly

Irving R. Kaufman
per HJF

Thurgood Marshall

U.S.C.JJ.

8 February 1965.

CLERK'S OFFICE
U. S. COURT OF APPEALS
U. S. COURT HOUSE
FOLEY SQUARE
NEW YORK 7, NEW YORK

FEB 11 REC'D

February 10, 1965

People of the State of New York
v.
Milton A. Galamison, et al.
Docket Nos. 29166-29175 Decided January 26, 1965

In Judge Friendly's opinion in the above entitled case, the following change has been made:

Page 996 - 3 & 4 lines - "Virginia v. Rives, 100 U.S. 339" should read "Virginia v. Rives, 100 U.S. 313".

A. DANIEL FUSARO
Clerk

/vdl

A. DANIEL FUSARO
CLERK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 7

NL/walsh
Jan

SEP 3 REC'D

September 1, 1964

Re: Galamison et al. v. City of New York

Dear Sirs:

This Court has today disposed of the motion in the above entitled case thusly:

It is hereby ordered that the argument of the appeal be and it hereby is adjourned until the week of Sept. 28,1964 and schedule of briefing is modified according to within stipulation.

J.Edward Lumbard
U.S.C.J.

Very truly yours,

A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 7

A. DANIEL FUSARO
CLERK

SEP 3 RECD

Docket No. MR 56-62 Cal. No.

Re: M. Galamison et al. v. City of New York

Gentlemen:

In accordance with Rule 21 of this court the above entitled action will be added to the calendar shortly.

Enclosed is a Time Request Form.

Because of the great number of cases on this court's calendar, counsel are urged to limit themselves to the minimum time needed to present their case. All counsel are subject to the limitation that the court will allow no more time than it thinks adequate for a proper presentation of the issues.

If the enclosed form is not returned immediately it will be understood that you want for argument only whatever minimum time the court will assign.

Cases will be added to the day calendar according to the rules of this court. You will receive notice, if possible, by mail of the day certain set for argument.

Very truly yours,

A. DANIEL FUSARO
Clerk

Enclosure

TIME REQUEST FORM

Docket No. MR 56-62 Cal. No. .....

The name of counsel who will orally argue the above numbered appeal for .....

is .....,

whose telephone number is .....

Said counsel requests ..... minutes for the presentation of his argument

.....

(Signature)

.....

.....

I need more than 20 minutes because

.....

(Signature)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 7

A. DANIEL FUSARO
CLERK

Docket No. MR 56-62 Cal. No. .....

Re: M. Galamison et al. v. City of New York

Gentlemen:

This court sets all arguments of appeals for a day certain. Motions for adjournment should not be made unless for grave reason. In particular, the failure to file a brief within the time required by Rule 15(a) of the rules of this court will not be accepted as an excuse in motions for adjournment of argument.

The argument of the above entitled action has been set for Friday, October 2, 1964.

This date is a firm one. Counsel are expected to respond to the court's calendar call at 10:30 A.M. on the above date and to be prepared to argue then.

Very truly yours,

A. DANIEL FUSARO
Clerk

File W Fair

SEP 17

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 7

A. DANIEL FUSARO
CLERK

	29166		156
	29167		157
Docket No.	29168	Cal. No.	158
	29169,70,71,72		159,160,161,162

Re: Milton A. Galamison, et al v. The City of New York

Gentlemen:

In accordance with Rule 21 of this court the above entitled action will be added to the calendar shortly.

Enclosed is a Time Request Form.

Because of the great number of cases on this court's calendar, counsel are urged to limit themselves to the minimum time needed to present their case. All counsel are subject to the limitation that the court will allow no more time than it thinks adequate for a proper presentation of the issues.

If the enclosed form is not returned immediately it will be understood that you want for argument only whatever minimum time the court will assign.

Cases will be added to the day calendar according to the rules of this court. You will receive notice, if possible, by mail of the day certain set for argument.

Very truly yours,

A. DANIEL FUSARO
Clerk

Enclosure

TIME REQUEST FORM

Re: Milton A. Galamison, et al v. The City of New York

Docket No. 29166
29167
29168
29169,70,71,72 Cal. No. 156
157
158
159,160,161,162

The name of counsel who will orally argue the above numbered appeal for .....

is .....,

whose telephone number is .....

Said counsel requests ..... minutes for the presentation of his argument

.....

(Signature)

.....

I need more than 20 minutes because

.....

(Signature)

A. DANIEL FUSARO
CLERK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 7

JAN 27 RECD

January 26, 1965

Galamison et al
v.
City of New York

vs.

Deutsch et al
v.
City of New York

Dear Sirs:

The Court has today handed down a decision in the above-entitled cause affirming the decision of the District Court.

Copies of opinions may be obtained in the Clerk's office in the afternoon of the day following decision, in accordance with Rule 18(5) of this Court.

Judgment has been entered today and a mandate will issue in accordance with Rule 28 of this Court.

Very truly yours,

A. DANIEL FUSARO
Clerk

156-165

2/28

February 17, 1965

John Silverberg, Esq.
15 Park Row
New York 38, New York

re: Galamison v. State of New York

Dear John:

I have been much concerned about what to do in Galamison in light of the facts and the opinion. It seems to me we ought to give very careful consideration to the next step, if any. An adverse decision here would hurt people all over the U.S. The facts for removal are such that a blind appeal to the U.S. Supreme Court, without serious consideration, and without an appraisal of other cases in these issues going to the Supreme Court might be extremely harmful. The minority opinion of Marshall seems to me a clear suggestion to the Supreme Court to dispose of the case summarily. He seems to be saying the issue is important, the case is not the one the Supreme Court should use as its lead on this point.

May I hear from you?

Regards,

CR:jp

Carl Rachlin
General Counsel

cc: William Emmtler, Esq.
511 Fifth Avenue
New York, New York

bcc: John Pratt, Esq.
George Schiffer, Esq.

Hello up
Dear John
I have
heard from
Mr Galamison
yet

March 9, 1965

John Silverberg, Esq.
15 Park Row
New York, New York 10038

In re: Galamison v. State of New York

Dear John:

I haven't heard from you on Galamison.
May I?

Regards.

Sincerely,

Carl Rachlin
General Counsel

CR:JG

JOHN E. SILVERBERG
ATTORNEY AT LAW
15 PARK ROW
NEW YORK 38, N. Y.
BEEKMAN 3-7990

MAR 22 1965

March 18, 1965

Carl Rachlin, Esq.
C/O CORE
38 Park Row
New York, New York

Re: People v. Galamison

Dear Carl:

In reply to your recent inquiries, let me say that I do not agree with your estimate of the case or with your evaluation as to how Judge Thurgood Marshall feels about the case.

It appears to me that he has written a very strong dissent. While the defendants in these cases might eventually be found guilty, this would have no bearing whatsoever on their right to a federal forum.

As you may have heard, the Fifth Circuit has just upheld the right of removal in a case in which petitions were filed alleging under Subdivision 1, that a fair trial cannot be received in the State of Georgia, and under Subdivision 2 that at the time of their arrest, the petitioners were demonstrating for their civil rights. As you know, People against Galamison is a case which rests entirely upon Subdivision 2, in that all of the petitioners at the time of their arrest were demonstrating for their civil rights. While the Georgia decision did not touch the Subdivision (2) aspect of the case, the construction of Subdivision (1) was very broad and therefore in conflict with the Second Circuit's narrow construction.

While the civil rights problems of Negroes in the South are admittedly quite different from those in the urban

JOHN E. SILVERBERG
ATTORNEY AT LAW
15 PARK ROW
NEW YORK 38, N. Y.
—
BEEKMAN 3-7990

slum ghettos of the North, I cannot agree with your estimate that one is more important than the other or more deserving of corrective action than the other.

I think you will agree that the removal procedure if sustained by the United States Supreme Court might very well induce an enlightened state such as New York to abandon its hostility to the goals and activities of civil rights demonstrators in the North. This is particularly true in light of President Johnson's recent, historic address.

I feel very strongly that the cases from the southern states can stand very well on their own merits and that our Supreme Court is sufficiently sympathetic to the cause to uphold their rights. It appears that traditionally a far more difficult problem exists in places such as New York City, precisely because it has the reputation of being fair and enlightened although the Negro residents of its slums and ghettos hardly agree with this image which New York so convincingly promotes.

I don't believe, due to the complexities of the case, that there is any possibility of a summary disposition by the Supreme Court. If the Court takes Certiorari, which now appears not unlikely due to the conflict between the circuits, I think they will give the problem thorough consideration. If they refuse to take Certiorari, as you know, that only means that three (3) justices could not be found who wanted to review the case.

You are, no doubt, aware of the fact that I still owe a good deal of money due to the expenses in this case for which I have not yet been reimbursed. George Schiffer told

JOHN E. SILVERBERG
ATTORNEY AT LAW
15 PARK ROW
NEW YORK 38, N. Y.
—
BEEKMAN 3-7990

me before leaving for Europe that those expenses could now be paid by National CORE. I would very much appreciate your letting me know whether these expenses may now be paid.

Also, please let me know your feeling about the other matters that I have discussed in this letter.

Very truly yours,

John E. Silverberg
JOHN E. SILVERBERG

JES:kc

cc Kunstler, Kunstler & Kinoy, Esqs.
511 Fifth Avenue
New York, New York

March 22, 1963

John E. Silverberg, Esq.
15 Park Row
New York 38, N.Y.

Dear John,

Thank you for your letter of March 18th received this morning.

My concern, which I apparently did not make clear in my original letter to you, was not that the problems of the South were more important than those of the North but that, in terms of the constitutional issues, they are clearer to present. And the Southern cases on removal are more easily won, as pointed out by you, in the Fifth Circuit.

We are heavily in your debt and, of course, are anxious to do what we can to reduce that debt. Your letter doesn't make clear what George Schiffer told you and since he dashed off to Europe he didn't tell me either. I am afraid at this time I cannot undertake any new and additional expense. I wish it were not true because I am as anxious as you to participate in the making of new law which would aid the civil rights movement but you know our financial condition.

If you go ahead with Mr. Galamison's case, I regret not taking the risk but I do not feel that at this time we can undertake that kind of an expenditure.

I wholeheartedly agree with you that we have got to get across to the courts somehow that the New York State courts are not what they appear to be. My doubt is reserved for this particular case, which may do harm rather than good for the very reasons you suggest. In order to win what is obviously a difficult but important issue we must present to the Supreme Court a factual situation which will make them want to decide in our favor. In other words, we must treat them first as a jury, then as a court. I do not believe this case can do that, even though the New York courts did not behave as you and I think they should. But a bad decision at this juncture in a Northern case will be very harmful to everyone and therefore I urge reconsideration. With the civil rights movement developing the way

./.

CORE Legal Dept.

it is, there will be plenty of better factual situations in the future. What should be done is a log kept of cases so that, at the right time, when the removal petition is made, there will be a history to show to the federal court which will be compelling.

With best wishes,

Sincerely,

Carl Rachlin
General Counsel

cc: George Schiffer, Esq.

CR:hdl

MSS SEDFRE

REFERENCE - STATE OF NEW YORK V. GLICK et al, 1964

Historical Society of Wisconsin

Please Retain Original Order

Box 40
Folder 17

Wednesday, December 23, 1964

Disposition of charges against GIBSON, GLICK and GARDNER:

Part I-B, Bronx Criminal Court
Hon. O'Brien

motion to dismiss made on affidavit of merit made out by J. Zalon
Releases were tendered to the Court and the D.A. signed by the three defendants.

ADA William Holland personally appeared for the People, after consulting with Mssrs. Getzoff and Dollinger.

Although D.O.R.s were granted to the other four defendants on the same complaint, this is the first action taken to dismiss any of the cases to date.

Three others involved in this incident, who had been charged initially with Felonious Assault subsequently pleaded guilty to the misdemeanor, and received suspended sentences. One of these was later involved in a fracas, and shot to death by a cop-

Re Anthony Spencer: he was in Part III, along with a few xx other youngsters. He also had a D.O.R. last April. However, he now refuses to sign any releases, and we therefore disclaim any interest in his case. GS had suggested giving it to Herb Calender to see whether he would have any luck in getting Dpencer to sign...if not, forget it Herb was completely disinterested. Ergo, so are we.

The D.A. did suggest that they might activate the case against Spencer, but he did not make any committment one way or the other.

jules

attorney for c fel ass't A.s.c
Robt Kasanof 52 B'way NYC
WH3- 5380

GENERAL RELEASE

T O ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN

GREETINGS: Know Ye that JEFF GLICK, residing at 1845 Phelan Place, Bronx, New York; WILLIAM GEBSON, residing at 408 W., 150 Street, New York City, New York; RAY GARDNER, residing at 412 W., 148 Street, New York City, New York and TONY SPENCER, residing at 250 E., 105 Street, New York City, New York, for and in consideration of the sum of ONE DOLLAR ($1.00) lawful money of the United States of America to them in hand paid by the CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, and the directors, officers, employees and representatives of all of the foregoing, and THOMAS NEARY, Badge #478, BERNARD MEYER, badge #564; and WILLIAM O'HARA, badge #5449, respectively detective and patrolmen of the POLICE DEPARTMENT OF THE CITY OF NEW YORK, the receipt whereof is hereby acknowledged, have remised, released, and forever discharged and by these presents do for their heirs, executors, and administrators and assigns, remise, release and forever discharge the said CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, and the directors, officers, employees and representatives of all of the foregoing, and THOMAS NEARY, badge #478, BERNARD MEYER, badge #564; and WILLIAM O'HARA, badge #5449, respectively detective and patrolmen of the POLICE DEPARTMENT OF THE CITY OF NEW YORK, their heirs, executors, administrators, successors and assigns of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning,

bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty, or in equity, which against said CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, and the directors, officers, employees and representatives of all of the foregoing, and THOMAS MEARY, badge #478, BERNARD MEYER, badge #564; and WILLIAM O'HARA, badge #5449, respectively detective and patrolmen of the POLICE DEPARTMENT OF THE CITY OF NEW YORK, they ever had, now have or which their heirs, executors, or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the begining of the world to the day of the date of these presents.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 23 day of October in the year one thousand nine hundred and sixty-four.

Sealed and delivered in the presence of

Jeff Glick

William Gibson

Ray Gardner

Tony Spencer

May , 1964

We, the undersigned, are the natural parents of who executed the within release. We hereby join in the within release.

_____

_____

May , 1964

I, the undersigned, am the mother of who executed the within release. I hereby join in the within release.

_____

May , 1964

I, the undersigned, am the father of who executed the within release. I hereby join in the within release.

_____

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the 23rd day of Oct., 1964,
before me personally came William Gibson
to me known and known to me to be the person described
in and who executed the foregoing instrument, and duly
acknowledged to me that he executed the same.

Notary Public

JULES D. TALON
Notary Public - State of New York
No. 31-9786035
Qualified in New York County
Commission Expires March 30, 1966

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the 16th day of Oct., 1964,
before me personally came Ray Gardner
to me known and known to me to be the person described
in and who executed the foregoing instrument, and duly
acknowledged to me that he executed the same.

Notary Public

JULES D. FALON
Notary Public - State of New York
No. 31-9786035
Qualified in New York County
Commission Expires March 30, 1966

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the 16th day of Oct, 1964,
before me personally came Jeff Gluck
to me known and known to me to be the person described
in and who executed the foregoing instrument, and duly
acknowledged to me that he executed the same.

Notary Public

JULES O. ZALON
Notary Public - State of New York
No. 31-[illegible]
Qualified in New York County
Commission Expires March 30, 1966

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the day of , 1964,

before me personally came

to me known and known to me to be the person described in and who executed the foregoing instrument, and duly acknowledged to me that he executed the same.

_____

Notary Public

Gleason 408 W 150 Hay WA 6-0773
6-6787

Gardner 412 W 148 Primrose Cricket club
ENG 9299 TO 8-9551 AV3-9305

Glick- 1845 Phelan Pl. Bxy CY 4-4356

Hangar

Bank 3

April 8, 1964

Marvin Karpatkin, Esq.,
10 Columbus Circle,
New York, N.Y.

Re: People vs. Gibson et al.

Dear Marv:

Pursuant to our conversation, this letter will serve to give you the necessary facts as I know them.

The case is set peremptorily for April 24. It is pending at Part 1-B at Bronx County Criminal Court, 162nd Street and Washington Avenue. From there it will go to Part 3 for assignment.

One of the people on our side, Anthony Spencer, and a couple on the other side are juveniles. All of the cases are being tried together. Since there have been nine previous adjournments, a further adjournment is out of the question. You are familiar with the situation vis-a-vis the District Attorney and other counsel, since you have already spoken to the District Attorney.

The incident in question occurred on October 6, 1963 at about 12:55 AM (in other words it occurred shortly after midnight Saturday/Sunday). The defendants reached the police station at 1:15, for the purpose of making complaints, they thought. They reached a hospital at approximately 3:00 AM. They were returned to the police station at approximately 4:00 AM. They were then told that they had to stay, but were not formally under arrest. Formal arrest and booking occurred at about 8:00 AM. Defendants were allowed to make telephone calls at 9:30 AM and were in court between 11:00 and 11:30 AM.

SUN.

They were then released on parole.

Defendants are charged with unlawful assembly and with violations of Penal Law §§2092(1) and 2092(2). The complaints are signed by police officers who had no personal knowledge of the facts whatsoever.

The incident was somewhat as follows. There is a tape recording made on or about October 10, sort of mass interview conducted by Mark Lane. I know of no other preparation. Bob Kasanoff, who is handling four related felony assaults cases probably has more information.

On the evening in question, there was a birthday party for Jeff Glick at the apartment of Lester and Arthur Williams. Arthur is now on CORE staff. The neighborhood is predominantly white and, in addition, has an office and apparently some membership of the National Renaissance Party. When the Williams boys moved in to the neighborhood, they were by no means welcome.

Shortly before the question, a group of people from the party walked some others to the subway. As they passed a bar at the corner of 164th and Ogden, loungers made a few remarks. On the way back from the subway, there were more remarks and, at that corner, a group of people from the bar, estimated at approximately 25 surrounded seven CORE members and a girl. The CORE members tried to talk their way out of it and then began to retreat along Ogden in a northerly direction. It was at this point that the fight started. continuing for some five minutes. The CORE group made every effort to disengage, out people retreating northerly along Ogden and then westerly along 165th to Summit where they were able to return to the apartment. They were pursued all the way and their attackers gathered outside the apartment building. In the course of the retreat and pursuit, one of the attackers made an effort to run down Jeff Glick with a Hudson automobile. Bottles, knives, automobiles, radio antennas, pieces of pipes and debris, all were utilized, in addition to bicycle chains carried by some of the attackers. While the attackers sustained the more

severe injuries, including knife wounds. Spencer's arm was slashed, Gibson had broken ribs, broken nose and a concussion and all our people were damaged in various ways. Even the girl was assaulted.

Upon returning to the apartment, some of the CORE people called the police. No policeman had been on the scene during any part of the fight. When the police arrived, they entered the apartment. They took down to the station those CORE members who wished to make complaints against their attackers. Those who did not wish to make complaints were not taken to the police station. Only repeated demands by the CORE people caused the police to arrest any of the attackers.

If the District Attorney's office cannot be persuaded to dismiss all charges, it will be necessary to hold a meeting sufficiently in advance of April 24 to allow adequate preparation. For that purpose, the names and addresses of the four defendants are enclosed:

Jeff Glick,
1845 Phelan Pl.,Bronx
CY4-4356

William Gibson,
408 W., 150th St.,
WA6-0173

Ray Gardner,
412 W., 148 St.,
EN2-9299 - FO8-9551

Tony Spencer,
250 E., 105 St.,
JE6-3394

I will be glad to assist you in calling the defendants and witnessess together.

Many thanks for your volunteering to take this case.

With best wishes,

Sincerely yours,

George Schiffer

cc: Carl Rachlin, Esq.
Jeff Glick
William Gibson
Ray Gardner
Tony Spencer

29 April 1964

Marvin Moses Karpatkin, Esq.
660 Madison Avenue
New York 21, New York

Dear Marvin:

Thank you for your letter of the 24th concerning the cases of Glick, Gibson, Gardner and Spencer. As you know, this is just one more instance in which we are indebted to you.

In view of the relationship you have established with the District Attorney's office in the Bronx, I wonder if it would not be advisable to have a meeting sometime in the future with Mr. Dolinger to discuss some of those cases you and I talked with Commissioner Murphy about.

Kindest regards.

Sincerely,

Carl Rachlin
General Counsel

CR:LP

cc: George Schiffer, Esq.
Robert Kasanof, Esq.
Naomi Levine, American Jewish Congress

S.R. 402

THE CITY OF NEW YORK
DEPARTMENT OF HOSPITALS

SYDENHAM HOSPITAL
WEST 124TH STREET AND MANHATTAN AVE.
NEW YORK 27, N. Y.

April 29, 1964/jca

Schiffer and Cohen
40 East 49th Street
New York, New York 10017

RE: GIBSON, William

Attention: Mr. George Schiffer

Dear Sir:

Pursuant to our telephone conversation this date, I am returning herewith medical abstract on your above named client, our patient, and receipt for $5.00, abstract fee.

Very truly yours,

PAULINE P. MATUSOW, M. D.
Administrator, Medical

MILTON E. WEISS, AHA
Asst. Hosp. Administrator
encl. 2

City of New York
Police Dept. v N.Y.
Detective Thomas Neary - Badge # 478
Patrolman Bernard Meyer √64
" William O'Hara √749

Spencer - to be signed by parent or guardian

Jeffrey Glick.
William Gibson
Ray Gardner
Tony Spencer

W this back

R.F. 115–11,750 sets-216025(62) 114

No 27451

THE CITY OF NEW YORK
DEPARTMENT OF HOSPITALS

SYDENHAM HOSPITAL

Received From George Schiffer $5.00

New York, N. Y. 4-15 19 64

For Maintenance and Care of William Gibson

The Sum of Five 00/100

Period

Transcript

D. Morgan
Property Clerk

THE CITY OF NEW YORK—DEPARTMENT OF HOSPITALS

SYDENHAM

HOSPITAL

M 16022

Date 4-24-64

ABSTRACT OF MEDICAL RECORDS (FEE CASE)

FEE PAID $ 5.00

Rec. #27451/4-15-64

SENT TO

Schiffer and Cohen
40 East 49th Street
New York, New York 10017

ATT: Mr. George Schiffer

PATIENT IDENTIFICATION

LAST NAME	FIRST	MIDDLE OR MAIDEN	AGE	SEX
GIBSON,	William		20	M

ADDRESS 408 West 150th Street

New York, New York

ADMITTED TO HOSPITAL	HISTORY No. 5602/63
DATE ADMITTED 10-7-63	DATE DISCHARGED 10-18-63
TREATED IN O.P.D. OR EMERGENCY CLINIC	HISTORY No.
DATES TREATED FOR THIS CONDITION	

(Include pertinent and significant information pertaining to:
Chief Complaints, Previous History, Diagnosis, Laboratory and X-ray Findings,
Course and Treatment in Hospital, Disposition.)

COMPLAINT: Assaulted about 1/4 hr before admission, vomiting, headache, unable to open mouth.

HISTORY: Fighting with people in a party at app. 11 p. m., Saturday night, 2 days ago (Oct. 5) and was hit over forehead, face and nose by steel pipe and was kicked on his body. He has had transient loss of consciousness and dixxiness and picked up by policemen to hospital of Brown X-ray film taken there, sent to the court, and released to home on Sunday evening. Sent to our hospital for further care.

CONSULTATION: Neurosurgery QUESTION: Adm. 10-7-63, following a beating sustaining head injury and multiple bruises. Complaining of headaches.
NEURO EXAM At present he is alert and oriented. No motor, sensory disturbance. No pathologic reflexes. Pupils RROOE and react to light. IMPRESSION: Recovering from cerebral concussion
RECOMMENDATION: Observation, skull x-rays

X-RAY: Skull, L-S Spine, Chest, Nasal bones, Rib cage - 10-9-63

Examination of nasal bones show a fracture through the left nasal bone without displacement.
Examination of skull shows no evidence of fracture.
Examination of ~~thumb~~ chest shows no abnormalities of heart or lungs
Examination of the right ribs show no evidence of fracture.
Examination of the lumbosacral spine and pelvis shows no evidence of fracture or dislocation.

TREATMENT: Bed rest, diet as tolerated, x-rays, laboratory studies. Medications

LABORATORY: HGB %100;CM 14.5;HCT 45%;WBC 7,200;Seg 60;Staff 4;Lymph 36 - 10-8-63
Routine urinalysis

COURSE: Gradual improvement

DIAGNOSIS: Cerebral Concussion, Contusion of Head and Face, Fracture of nasal bone

DISPOSITION: OPD or private physician for follow-up.

Signed PAULINE P. MATUSOW M. D.
Administrator- Medical Superintendent

Asst. Hosp. Administ
MILTON E. WEISS, AHA

KARPATKIN, OHRENSTEIN & KARPATKIN
COUNSELORS AT LAW

MARVIN MOSES KARPATKIN
MANFRED OHRENSTEIN
RHODA HENDRICK KARPATKIN

660 MADISON AVENUE
NEW YORK 21, N. Y.
TEMPLETON 2-9600
CABLE "KARPOLAW NEWYORK"

April 24, 1964

Carl Rachlin, Esq.
General Counsel
Congress of Racial Equality
38 Park Row
New York, N.Y.

Re: The People of the State of New York
v. Jeffrey Glick, William Gibson,
Ray Gardner and Tony Spencer

Dear Carl:

I am happy to confirm to you that these cases were all satisfactorily disposed of in a hearing held this morning in Criminal Court, Bronx County, Part 1B, before Judge Doris Byrne.

The disposition was via the entry of D.O.R. in each case, to become final six months from now, i.e., October 24, 1964, upon the further condition that General Releases be executed and delivered in favor of the City of New York, the Police Department of the City of New York and the three police officers involved: - Detective Thomas Neary, Badge # 478; Patrolman Bernard Meyer, Badge #564; and Patrolman William O'Hara, Badge #5449. The General Releases should be executed and acknowledged by the individual defendants except that in the case of Spencer, who is a minor, the Release will have to be signed by a parent or a guardian. A similar disposition was made with respect to all of the other defendants in this case, some eight or nine in number, all of whom were represented in court by counsel.

As you know, the charge against all, both our clients and the others, was Unlawful Assembly under §2092(1) and §2092(2) of the Penal Law.

COPY

Carl Rachlin, Esq.

Unaffected by today's disposition are the charges of felonious assault against another group of defendants, who were also involved in the same factual situation, but I understand that these other cases are being ably handled by Bob Kasanof to whom I am sending a copy of this letter with my offer to be of any possible assistance.

I will also request that George Schiffer, to whom a copy of this letter is being sent, be kind enough to make the arrangements for the preparation and execution of General Releases, and other appropriate filing prior to the dismissal date, and likewise the arrangements for some attorney to appear in Court on or after October 24, 1964, to formally move the entry of dismissals.

As you know, today's disposition was effected on the basis of a series of telephone conversations and conferences which I had with Mr. Getzoff, Chief Assistant District Attorney of Bronx County and Mr. Holland, the Chief of the Criminal Court Bureau. The matter had been personally cleared with District Attorney Dollinger himself.

I have the impression both from this matter, as well as from the disposition of the White Castle sitdown cases last summer with which I had something to do, that we have a relatively cooperative District Attorney's office in Bronx County and if matters such as these are handled adroitly and intelligently, we could secure via negotiation results which are no less beneficial to our clients and their principles than by litigation.

A final observation: It was clear to me, and I think likewise clear to George Schiffer, who appeared in Court the last time, that the same disposition which we obtained today could have been obtained months ago. The incident took place in October, 1963, and there has been some seven or eight court appearances involving costly expenditure of time for all concerned. You and I both know where the fault lies, and I agree with you that we have to take steps to see to it that our people have proper, competent and responsible legal representation to the fullest extent possible.

Cordially,

Marvin Moses Karpatkin

MMK:rtg
CC: George Schiffer, Esq.
Robert Kasanof, Esq.
Naomi Levine, American Jewish Congress

April 28, 1964

Sydenham Hospital,
855 Manhattan Avenue,
New York 27, N.Y.

Gentlemen:

On April 8, 1964 I requested a copy of the hospital records of William Gibson. These records were to be submitted to the court on April 20.

I received today, April 28, an <u>abstract</u> of medical records of William Gibson which at this late date is of no use to me.

I am returning the abstract together with receipt No. 27451, with the request that the fee of $5.00 which I paid by check #108 be refunded to me.

Very truly yours,

George Schiffer

Encl.

sets-423059(62) 114

M 16022

THE CITY OF NEW YORK—DEPARTMENT OF HOSPITALS

SYDENHAM

HOSPITAL

Date 4-24-64

ABSTRACT OF MEDICAL RECORDS (FEE CASE)

FEE PAID $5.00
Rec. #27451/4-15-64

SENT TO

Schiffer and Cohen
40 East 49th Street
New York, New York 10017

ATT: Mr. George Schiffer

PATIENT IDENTIFICATION

LAST NAME	FIRST	MIDDLE OR MAIDEN	AGE	SEX
GIBSON, William			20	M

ADDRESS 408 West 150th Street

New York, New York

ADMITTED TO HOSPITAL — HISTORY No. 5602/63

DATE ADMITTED 10-7-63 — DATE DISCHARGED 10-18-63

TREATED IN O.P.D. OR EMERGENCY CLINIC — HISTORY No.

DATES TREATED FOR THIS CONDITION

(Include pertinent and significant information pertaining to:
Chief Complaints, Previous History, Diagnosis, Laboratory and X-ray Findings,
Course and Treatment in Hospital, Disposition.)

COMPLAINT: Assaulted about 1/4 hr before admission, vomiting, headache, unable to open mouth.

(Oct. 5)

HISTORY: Fighting with people in a party at app. 11 p. m., Saturday night, 2 days ago/and was hit over forehead, face and nose by steel pipe and was kicked on his body. He has had transient loss of consciousness and dixxiness and picked up by policemen to hospital of Brown X-ray film taken there, sent to the court, and released to home on Sunday evening. Sent to our hospital for further care.

CONSULTATION: Neurosurgery QUESTION: Adm. 10-7-63, following a beating sustaining head injury and multiple bruises. Complaining of headaches.
NEURO EXAM At present he is alert and oriented. No motor, sensory disturbance. No pathologic reflexes. Pupils RROOE and react to light. IMPRESSION: Recovering from cerebral concussion
RECOMMENDATION: Observation, skull x-rays

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TREATMENT: Bed rest, diet as tolerated, x-rays, laboratory studies. Medications

LABORATORY: HGB %100;GM 14.5;HCT 45%;WBC 7,200;Seg 60;Staff 4;Lymph 36 - 10-8-63
Routine urinalysis

COURSE: Gradual improvement

DIAGNOSIS: Cerebral Concussion, Contusion of Head and Face, Fracture of nasal bone

DISPOSITION: OPD or private physician for follow-up.

Signed PAULINE P. MATUSON, M. D.
Administrator- Medical Supervisor

Asst. Hosp. Administ
MILTON E. WEISS, Ma

R.F. 115–11,750 sets-216025(62) 114

No 27451

THE CITY OF NEW YORK
DEPARTMENT OF HOSPITALS

SYDENHAM HOSPITAL

New York, N. Y. 4-15 19 64

Received From George Schiffer $5.00

For Maintenance and Care of William Gibson

The Sum of Five ~~~~~ 00

Period 1 transcript 00

D. Morgan
Property Clerk

SEDFRE

REFERENCE - STATE OF NEW YORK V. GLICK et al - CASE, CORRESPONDENCE, 1963-1966

Box 40
Folder 18

Society of Wisconsin

Please Retain Original Order

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: FIRST DEPARTMENT

----------x

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT

-against-

JEFFREY GLICK, STEVEN FRIEDER, VICKI MORRIS, RAYMOND G. GARDNER, LESTER WILLIAMS, and WILLIE BLACKMAN

DEFENDANTS-APPELLANTS

----------x

NOTICE OF MOTION

DOCKET NOS.
5813, 5814, 5815,
5817, 5818, 5819.

BT
40860/66

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavits of Stephen M. Nagler, Esq. and Vicki Morris, being duly sworn to the 21st day of October, 1966, the undersigned will move this Court at a Term thereof to be held at the Courthouse, 60 Centre Street in the City and County of New York on the 26th day of October at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order extending the time of the defendants-appellants to perfect and file their case on appeal herein to the January Term of this Court and permitting Vicki Morris to appeal as a poor person on the original records and typewritten briefs, and for such other and further relief as to this Court may seem just and proper.

DATED:
New York, New York
October 21st, 1966

Yours, etc.,
Stephen M. Nagler, Esq.
Attorney for Defendants-
Appellants
Office and P.O. Address
150 Nassau Street
New York, New York 10038

TO: Hon. Frank S. Hogan, Esq.
District Attorney of New York County
Office and P.O. Address
155 Leonard Street

Clerk, Appellate Term
First Department

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: FIRST DEPARTMENT

----------x

PEOPLE OF THE STATE OF NEW YORK

-against-

JEFFREY GLICK, STEVEN FRIEDER, VICKI MORRIS, RAYMOND G. GARDNER, LESTER WILLIAMS, and WILLIE BLACKMAN

----------x

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.

VICKI MORRIS BEING DULY SWORN, DEPOSES AND SAYS:

1. I was convicted after trial in the Criminal Court of the City of New York, County of New York, of violating S. 2036 and S. 1851 of the Penal Law, and I was sentenced to ten days in the workhouse and thirty days suspended sentence on or about the 29th day of August, 1963.

2. I am twenty-three years of age, unmarried, and have no dependents.

3. I am presently unemployed. I am a full time day student at the City University of New York (City College).

4. I receive irregular assistance from my parents (approximately $300 (threehhundred dollars) in 1965), and from friends (not more than a total of $250 (two hundred and fifty dollars). I do not live with my parents. My parents' total income for 1966 will be less than $9500. My father is preeently unemployed. My parents are also supporting my grandparents (my mother's parents). My parents are not responsible for

my maintenance and they are neither able nor willing to pay the costs of this appeal.

5. I have no sources of income other than those mentioned above.

6. I have $125.00 (one hundred and twenty-five dollars) deposited in a savings account. I have no checking accounts, stocks, bonds, or insurance.

7. I do not own an automobile.

8. I do not own any real property.

9. The only personal property that I own is used clothing and used books of the value of approximately $500 (five hundred dollars).

10. I have asked Stephen M. Nagler, Esq. to represent me on this appeal and he has consented to do sowithout fee. I have not paid counsel or any other fees at any stage of these proceedings because Percy Sutton, Esq., who represented all defendants including myself at the trial and Stephen M. Nagler, Esq., who has consented to represent me on this appeal have donated their services without any compensation whatsoever.

11. I do not have sufficient funds to pay the cost of transcription of the minutes of my trial, to retain counsel, or to pay any of the other costs, fees or expenses necessary to maintain this appeal. Nor are my parents able or willing to assist me in this matter.

12. I am innocent of the charges against me.

13. I am not now incarcerated.

14. I have been assisted in the preparation of this affidavit by Stephen M. Nagler, Esq.

15. No previous application for the relief sought herein has been made to this or any other court.

WHEREFORE, I ask permission to prosecute this appeal as a poor person on the original record and typewritten briefs, and that the court assign Stephen M. Nagler, Esq. as attorney and counsel for that purpose without compensation.

VICKI MORRIS

Sworn to before me this
21st day of October, 1966.

WALTER HOLDEN
NOTARY PUBLIC, State of New York
No. 24-6939910
Qualified in Kings County
Commission Expires March 30, 1968

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: FIRST DEPARTMENT

----------x

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT

-against-

JEFFREY GLICK, STEVEN FRIEDER, VICKI MORRIS, RAYMOND G. GARDNER, LESTER WILLIAMS, and WILLIE BLACKMAN
DEFENDANTS-APPELLANTS

----------x

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

STEPHEN M. NAGLER, Esq., being duly sworn, deposes and says:

1. I am an attorney with offices at 150 Nassau Street, Borough of Manhattan, City and State of New York.

2. I have discussed this case with one of the attorneys representing the defendants-appellants at the trial in the Criminal Court, New York County, and I have read the complaints and other papers on file herein.

3. The defendants-appellants were arrested on or about the 1st day of August, 1963. The case was reached for trial on the 23rd day of August, 1963 in Part 2B-1 of the Criminal Court of the City of New York, before Hons. Benjamin Gassman, Evelyn Richman, and Arthur Dunaif, Judges. The defendants-appellants were found guilty under SS. 2036

and 1851 of the Penal Law (Defendants Glick and Frieder were convicted of violating S. 2036 only) on August 29th, 1963 and were sentenced on that day to ten days in the City Prison on the count under S. 1851 and thirty days ss under S. 2036.

4. An appeal was taken to this Court from this judgment by filing a Notice of Appeal in the office of the Clerk of New York County and serving copy of such Notice on the District Attorney of New York County on or about the 12th day of September, 1963.

5. Deponent believes that the contentions of defendants-appellants for appeal to this Court have merit and that defendants-appellants are innocent by virtue of the fact that:

a. The defendants-appellants lawfully entered a public building during business hours and hence cannot properly be convicted of violating S. 2036 of the Penal Law. People v. Lawson, (Sup. Ct., App. T., 1st Dept. 1964).

b. One is not required to assist in one's own arrest and hence the claim that defendants remained inert when they were placed under arrest does not constitute a violation of S. 1851 of the Penal Law. Furthermore, if the arrest under S. 2036 was wrongful, as defendants contend, even resistance would have been justified.

c. The sentences of ten days for violating S. 1851 were unreasonable under the circumstances.

6. Defendant-appellant Morris informs me that she is unable to pay the costs, fees and expenses necessary to maintain this appeal. She further informs me that other defendants-appellants are living in dire circumstances, although she is unable to provide figures as to their incomes.

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7. Defendant-appellant Morris desires that I be assigned to prosecute this Appeal and I have agreed to do so without compensation. Neither I nor any other attorney has received any compensation for any services in this case.

8. Defendant-appellant Morris is not now incarcerated.

9. No previous application for relief sought herein has been made to this or any other court.

WHEREFORE, I ask permission on behalf of defendant-appellant to prosecute the Appeal in the above-entitled action as a poor person on the original record and typewritten briefs and that the court assign me as attorney and counsel for that purpose and that as attorney and counsel I agree to prosecute the same without compensation.

STEPHEN M. NAGLER, ESQ.
Attorney-at-Law
Office and P.O. Address
150 Nassau Street
New York, New York 10038

Sworn to before me this
21st day of October, 1966

Index No. 408-60-66

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED by and between the undersigned attorneys for the People of the State of New York and Defendants-Appellants listed on the following page that, on the basis of the accompanying affidavit of CARL RACHLIN, If the Court please, an order be entered adjorning the appeals of the Defendants-Appellants listed on the following page to the ~~November~~ January Term, 1967.

DATED: New York, New York
October 24,
~~August 25,~~ 1966

Respectfully submitted,

Calendar # 5815
5817
5818
5819
2841
5813
1581
1582
1583
1715
1716
1717
1718
1719
1720
6297
6298
6299
~~11548~~
~~11549~~

Frank Hogan, Esq.
District Attorney of New York County
155 Leonard Street
New York, N.Y.
Attorney for Respondent
per
Alan ~~Leibowitz~~ SCRIBNER

Carl Rachlin, Esq.
General Counsel of C.O.R.E.
38 Park Row
New York, New York
Attorney for Appellants

County clerk's numbers
show merit

CASES REVIEWED TO GO STIPULATION ATTACHED

Name of Appellant	Docket #	P.L. Charge	Notice of Appeal Filed	Sentence
--Jeffrey Glick 1845 Phelan Place Bronx	5819	Section 2036	9/12/63	30 days ss.
--Steven Frieder [illegible] W. 70th St.	5818	Section 2036	9/12/63	30 days ss.
--Vicki Morris Br. 2 St. Mklyn	2841	Section 2036	9/12/63	10 days + 30 days ss
--Raymond G. Gardner 412 W. 148th St.	5815	Section 2036 " 1851	9/12/63	10 days + 30 days ss
--Lester Williams 1018 Summit Ave. Br	5823	Section 2036 " 1851	9/12/63	10 days + 30 days ss
--Willie Blackman 102 W. 137th Street	5817	Section 2036 " 1851	9/12/63	10 days + 30 days ss
--Robert Gore 630 W. 147th St.	11549	Section 2036 " 722	7/26/63 "	10 days + 30 days ss 60 days " "
--Walter Flesch 178 Thompson	21550	Section 2036 " 722	7/26/63 "	60 days " "
--Elizabeth [illegible]off 541 E. 13th St.	1583	Section 2036	6/3/63	1 year ss
--Karin Berg 19 W. 69th St.	1582	Section 2036	6/3/63	1 year ss
--Edwin Levinson 240 W. 102nd St.	1581	Section 2036	6/3/63	1 year ss
--Stuart Wechsler 2036 Cruger Ave	1715	Section 2036	6/3/63	1 year ss
--Patricia Walker 350 Manhattan Ave.	1719	Section 2036	6/3/63	1 year ss
--Gloria Bouknight 403 W. 21st Street	1720	Section 2036	6/3/63	1 year ss
--Christopher Peditto 880 Bridgeboro Riverside, New Jersey	1717	Section 2036	6/3/63	1 year ss
--Charles Wilson Box 114 Summitville N. Y.	1716	Section 2036	6/3/63	1 year ss
--Jane Burnett [illegible] 531 W. 122nd Street	1718	Section 2036	6/3/63	1 year ss
JOEL FRIEDMAN 145 Waverly Place	6299	Section 722 " 1220	9/9/63	10 days
--Eleuterio Gonzales 209 Eldridge St.	6297	Section 722 V. & T 1220	9/9/63	10 days
--Jeffrey Kalb 198-10 67Ave.	6298	Section 722 " 1220	9/9/63	10days

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

CARL RACHLIN, ESQ. being duly sworn deposes and SAYS:

1. I am the attorney for all of the Defendants-Appellants listed on the preceding page and for the purposes of these appeals I am associated with Lloyd McAulay, George Schiffer, Sutton & Sutton, [redacted], and any and all other attorneys who represented the aforementioned Defendants-Appellants.

2. As appears on the attached list the aforementioned Defendants-Appellants were tried, convicted, and sentenced in the Criminal Court of the City of New York, County of New York between May and September (inclusive) of 1963. The charges on which they were convicted also appear on the attached list.

3. The appeals in all of these cases were or should have been adjourned pending the disposition of People v. Sara Penn, et al, which was decided by a denial of certiorari in or about April of 1966.

4. Upon the decision in People v. Sara Penn, et al, a stipulation was entered into between Frank Hogan, Esq., District Attorney New York County and me inwhich it was agreed that these cases should be perfected for the September Term, 1966 of this Court. The stipulation was signed on May 18, 1966 and was "so ordered" on May 31, 1966.

5. Several of the cases listed on that stipulation ~~amounting~~ were sought to be perfected as ordered for the September Term, 1966 of this Court. The cases listed on the preceding page, however, ~~and~~ not being perfected for the ~~September~~ November Term due to great difficulty involved in obtaining minutes, and an unusually heavy caseload in my office. The age of these cases ~~has~~ made it unusually difficult to locate the stenographers and the minutes which they recorded at the trials of these Defendants-Appellants. ~~The summer season and the vacation schedules of some of the stenographers have also made it difficult to obtain minutes quickly.~~ The preparation of ~~an~~ a brief in the case of Pierson v. Ray, (U.S. Supreme Court, October Term, 1966), a jurisdictional statement in the case of ~~People of the State of New York~~ v. William Spencer, and a similar statement in the case of People, etc. v. Herbert Callender, have been extremely time consuming, as also have been the preparation of briefs for the Supreme Court of California (Panish v. Civil Service Commission), the Appellate Division, Second Department (City of Nyack v. ?), and numerous others which have demanded my attention during the past few weeks.

WHEREFORE YOUR DEPONENT respectfully requests that an enlargement of time be granted ~~in~~which to perfect the within appeals to the January ~~November~~ Term, 1967.

Carl Rachlin

Sworn to before me this ~~3rd~~ day of ~~August~~ October, 1966.

Edward Shulman
NOTARY PUBLIC
State of N.Y.
No 24-8498410
Comm'n Exp 3/30/68

6. A further stipulation was entered into on August 25, 1966 ~~which~~ requested that the matters listed be adjourned to the November Term of this Court. Several of those cases are being perfected for the November Term. ~~This~~

This stipulation was subsequently ~~so~~ ordered."

7

At a Appellate Term of the Supreme Court held in and for the First Department of the City of New York, at the County Court House, Borough of Manhattan, City of New York, on the 8th day of November 67

PRESENT: HON. JACOB MARKOWITZ, J.P.

SAMUEL H. HOFSTADTER

SAUL S. STREIT Justices

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

Defendant-Appellant.

#693-67

Order Dismissing Appeal for Failure to Prosecute

Judgment of conviction criminal

Septemer

Judgment of conviction

Form No. 4

1479-64 (C.S.)

At an Appellate Term of the Supreme Court, first department, held at the Court House, Borough of Manhattan, City of New York, on the 10th *day of* ~~August~~ September, 1968.

Present:—HON. SAUL S. STREIT, J.P.

" JACOB MARKOWITZ,

" SAMUEL H. HOFSTADTER, *Justices.*

I hereby certify that the foregoing paper is a true copy of the original thereof, filed in my office on the 10th day of September 1968

THEODORE REITMAN
Clerk of the Appellate Term,
Supreme Court, First Department

Date SEP 10 1968

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

JEFFREY GLICK, STEVEN FRIEDER, VICKI MORRIS, RAYMOND G. GARDNER, LESTER WILLIAMS, and WILLIE BLACKMAN,

Defendants-Appellants.

Order upon motion. 40860/1966

The above named appellants having by notice of motion dated the 12th day of August 1968 moved for an order vacating the order of this Court, dated November 8, 1967, dismissing the appeal herein,

Now upon reading and filing said notice of motion and the ~~affidavit~~ statement of Stephen M. Nagler ~~affirmed~~ verified the 8th day of August 1968

in favor of said motion, and the ~~statement~~

~~affirmed~~

no one appearing

in opposition thereto,

IT IS ORDERED that said motion be and the same hereby is granted. In view of counsel's difficulty in obtaining the trial minutes and the affirmance by the Court of Appeals of this court's determination in the case of People v. Lawson, by which, in accordance with a stipulation entered into between the respective counsel, the disposition of the within appeal would be determined, the order of this Court, dated November 8th, 1967, dismissing the appeal, is vacated, and appellants are directed to perfect the appeal for the November, 1968, term.

Enter,

S. S. S.

Justice, Appellate Term,
Supreme Court, first dept.

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- VICKI MORRIS, Defendant-Appellant.	AFFIDAVIT DOCKET NO. B-5814/63

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

CARL RACHLIN, ESQ., being duly sworn, deposes and says:

1. I am an attorney admitted to practice law in the State of New York and represent Defendant-Appellant VICKI MORRIS as volunteer counsel.

2. The Appellate Term of the Supreme Court, First Department, by an order dated September 10, 1968 (annexed hereto) reinstated the appeal of Defendant-Appellant VICKI MORRIS and directed that the appeal be perfected for the November 1968 term.

3. The appeal of Defendant-Appellant VICKI MORRIS was duly perfected for the November 1968 term of the Appellate Term of the Supreme Court, First Department.

4. At the request of Jerry Slater, Assistant District Attorney for New York County, I agreed to stipulate that the argument of the appeal of Defendant-Appellant VICKI MORRIS, together with the appeals of the Defendant-Appellant named on the order dated September 10, 1968, be adjourned to the December 1968 term. (See annexed Stipulation.)

5. The Appellate Term of the Supreme Court, First Department, ordered the argument adjourned to the December 1968 term. The argument has been heard December 3, 1968 by the Appellate Term.

WHEREFORE, in order that Defendant-Appellant VICKI MORRIS not be deprived of her right to appeal the within conviction which has been reinstated by the Appellate Term and argued before the Appellate Term, I respectfully request that this Court either adjourn the surrender of VICKI MORRIS to not earlier than July 1969, or in the alternative that this matter be removed from the calendar and in the event of an unfavorable determination of the appeal of Defendant-Appellant VICKI MORRIS, the Clerk of this Court send a new Notice to Surrender and Abide by the Judgment.

CARL RACHLIN
Attorney for Defendant-Appellant

Office and P. O. Address:
164 Madison Avenue
New York, New York 10016

Tel. No. 212-532-8216

Sworn to before me this

20th day of January, 1969.

Notary Public

RICHARD M. KLEIN
Notary Public, State of New York
No. 31-7296425
Qualified in New York County
Commission Expires March 30, 1970

At an Appellate Term of the Supreme Court, first department, held at the Court House, Borough of Manhattan, City of New York, on the 10th day of August September, 1968.

Present:—HON. SAUL S. STREIT, J.P.
" JACOB M. ROKOWITZ,
" SAMUEL H. HOFSTADTER, Justices.

I hereby certify that the foregoing paper is a true copy of the original thereof, filed in my office on the 10th day of September 1968
THEODORE REITMAN
Clerk of the Appellate Term,
Supreme Court, First Department

Date SEP 10 1968

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
vs.
JEFFREY GLICK, STEVEN FRIEDER, VICKI MORRIS, RAYMOND G. GARDNER, LESTER WILLIAMS, and WILLIE BLACKMAN,
Defendants-Appellants.

Order upon motion. 40860/1966

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Now upon reading and filing said notice of motion and the ~~affidavit~~ statement of Stephen M. Nagler affirmed verified the 8th day of August 1968

in favor of said motion, and the ~~affidavit~~ statement

~~affirmed~~ ~~verified~~ ~~proof~~

no one appearing

in opposition thereto,

IT IS ORDERED that said motion be and the same hereby is granted. In view of counsel's difficulty in obtaining the trial minutes and the affirmance by the Court of Appeals of this court's determination in the case of People v. Lawson, by which, in accordance with a stipulation entered into between the respective counsel, the disposition of the within appeal would be determined, the order of this Court, dated November 8th, 1967, dismissing the appeal, is vacated, and appellants ~~are~~ are directed to perfect the appeal for the November, 1968, term.

Enter,

S. S. S.
Justice, Appellate Term,
Supreme Court, first dept.

NEW YORK SUPREME COURT

APPELLATE ....TERM.....—FIRST JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

540 Lester Williams, Vicki Morris, Raymond C. Gardner, Willie Blackman, Steven Freider, and Jeffry Glick

Defendant-Appellant.

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the argument of the appeal in the above-entitled action be adjourned to the DECEMBER 1968 TERM ~~day for~~ ~~19xx~~, subject to the approval of the Court.

Dated, New York, October 30th. 19 68

FRANK S. HOGAN
per JERRY SLATER, Asst. D.A.
Jerry Slater
District Attorney, New York County,
Attorney for Respondent.

CARL RACHLIN, ESQ.
per JERRY SLATER, Asst. D.A.
Jerry Slater
Attorney for Appellant.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: FIRST DEPARTMENT

- -

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

JEFFREY GLICK, STEVEN FRIEDER, VICKI MORRIS, RAYMOND G. GARDNER, LESTER WILLIAMS, and WILLIE BLACKMAN,
Defendants - Appellants

- -

NOTICE OF MOTION

INDEX NO. 40869/66

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavity of Stephen M. Nagler, Esq., duly sworn to the ____th day of April, 1968, the undersigned will move this Court at a term thereof to be held at the Courthouse, 60 Centre Street in the City and County of New York on the 10th day of April, 1968 at 10:00 in the foremoon or as soon thereafter as counsel can be heard for an order vacating and setting aside the order dismissing the appeal of the above named Defendants-Appellants pursuant to Rule III (20 (c), Rules of the Appellate Term, First Department, (the order dismissing the within appeal was entered on 1968), and for a further order directing an enlargement of time in which to perfect the within appeal, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
April ,1968

Yours, etc.,

Stephen M. Nagler, Esq.
Attorney for Defendant-
Appellants

Office & Post Office Address
164 Madison Avenue
New York, New York 10016

To: Frank Hogan, Esq.
District Attorney, New York County
Office and P.O. Address
155 Leonard Street
New York , New York

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, Respondent -against- LESTER WILLIAMS, VICKI MORRIS, RAYMOND G. GARDNER, WILLIE BLACKMAN, STEVEN FRIEDER, and JEFFREY GLICK, Defendants-Appellants	STIPULATION Index No. 40860/1966

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED by and between the undersigned attorneys for the People of the State of New York and the below-listed Defendants-Appellants:

1. The decision of the Appellate Term, First Department, with regard to the appeal of Defendant-Appellant VICKI MORRIS herein as a poor person, perfected for the November, 1968 term of this Court, because the facts and applicable law are substantially the same for all six appeals, shall be binding on the appeals of Defendants-Appellants LESTER WILLIAMS, RAYMOND G. GARDNER, WILLIE BLACKMAN, STEVEN FRIEDER, and JEFFREY GLICK, as if the same had been similarly perfected, presented to, and heard by this Court.

2. An order to this effect may be entered without further notice to either party.

Respectfully submitted,

DATED: New York, New York
October 23, 1968

Docket Nos. B-5813/63
B-5814/63
B-5815/63
B-5817/63
B-5818/63
B-5819/63

Frank S. Hogan, Esq.
District Attorney of New York County
155 Leonard Street
New York, New York
Tel. No. 212-732-7300
Attorney for Respondent

per _____
Alan Scribner, Esq.

_____
Carl Rachlin, Esq.
164 Madison Avenue
New York, New York 10016
Tel. No. 212-532-8216
Attorney for Defendants-Appellants

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM : FIRST DEPARTMENT x

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

-against- :

LESTER WILLIAMS, VICKI MORRIS, : NOTICE OF MOTION

RAYMOND G. GARDNER, WILLIE BLACKMAN, : INDEX NO. 40860

STEVEN FRIEDER, AND JEFFREY GLICK, :

Defendants-Appellants. :

x

SIRS:

Please take notice that on the 4th day of November, 1968, or as soon thereafter as counsel can be heard, the undersigned will move this Court at the Court House, 100 Centre Street, New York City, for an order adjourning the time for respondent to serve and file his brief and for the case to be set down for argument from the November term, 1968 to the March Term, 1969, and for such other relief as this Court may deem just and proper.

Yours truly,

FRANK S. HOGAN
District Attorney
New York County
155 Leonard Street
New York, N.Y. 10013
RE-2 7300

TO : CLERK OF THE APPELLATE TERM, FIRST DEPARTMENT
CARL RACHLIN, ESQ. and RICHARD KLEIN, ESQ.
Counsel for Defendants-Appellants

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM : FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

-against- : AFFIDAVIT

LESTER WILLIAMS, VICKI MORRIS, :

RAYMOND G. GARDNER, WILLIE BLACKMAN, :

STEVEN FRIEDER, AND JEFFREY GLICK, :

Defendants-Appellants. :

STATE OF NEW YORK)
) ss :
COUNTY OF NEW YORK)

JERRY SLATER, being duly sworn, deposes and says:

I am an assistant district attorney assigned to the Appeals Bureau of the New York County District Attorney's Office, and have been advised as to the steps heretofore taken in the instant appeal.

On August 29, 1963, the defendants were convicted of unlawful intrusion on real property (former Penal Law §2036) and, with the exception of defendants Freider and Glick, of resisting a public officer in the discharge of his duty (former Penal Law §1851). Defendant Morris was sentenced to thirty days on the former charge and twenty days on the latter charge, the sentences to run consecutively, the execution of the sentences was stayed pending appeal. On the charge of unlawful intrusion on real property, the remaining defendants were sentenced to thirty days, sentence suspended; on the charge of resisting a public officer in the discharge of his duty,

the remaining defendants were sentenced to ten days, the execution of which was stayed pending appeal. The record, which consists of 249 pages, and the brief, were received in the District Attorney's Office on October 22, 1968. The appeal in this case has been twice dismissed and then restored to the calendar by this Court.

I have been unable to write the respondent's brief in this case because of the priority of numerous other pending appellate cases. I expect to try a burglary case on November 15, 1968. In addition, I will perform two weeks of active duty in the U.S. Navy commencing January 27, 1969. This workload, which is formidable, necessitated the voluntary shortening of deponent's vacation by six days.

I have spoken to counsel for the defendants and they have told me that they have no objection to the extension of this case until the March Term, 1969.

In view of the foregoing, and most particularly the long time counsel for the defendants required to serve their clients, the People respectfully ask that the date for argument herein be extended to the March Term, 1969, and for such other relief as this Court may deem just and proper.

Jerry Slater

JERRY SLATER

Sworn to before me this
28th day of October, 1968

Jay F. Murray

JAY F. MURRAY, Notary Public
State of New York, No. 03-2832900
Qualified in Bronx County
Cert. Filed in New York County
Commission Expires March 30, 1969

Cittly

TO: 1) DEFENDANT: Elizabeth Elkind-193-26 Keno Avenue, Hollis, Queens New York City
2) ATTORNEY: Carl Rachlin, Esq., 164 Madison Avenue, New York City 10016
3) Surety: Arline Sherman c/o CORE, 360 West 125th Street, New York City
4) CLERK, PART 2B-1, CRIMINAL COURT, CITY OF NEW YORK, 100 CENTRE STREET, N.Y.C.

THE PEOPLE OF THE STATE OF NEW YORK

- against -

ELIZABETH ELKIND, Defendant

Docket # B-5813 through B-5819

Appeal #384-M-63

PLEASE TAKE NOTICE that the defendant-appellant, above named, is hereby required to appear and abide by the judgment of the Appellate Term, of the Supreme Court FIRST, Judicial Department, on TUESDAY, the 11th day of FEBRUARY, 1969, at nine-thirty o'clock in the forenoon of that day, at the Criminal Court of the City of New York, held at 100 CENTRE STREET MANHATTAN, in the County of NEW YORK, Part 2B-1 in accordance with the terms and conditions of your undertaking and recognizance on appeal in the above entitled action.

This notice is sent to you in order that your undertaking may not be forfeited.

E. E. Brown
COURT CLERK

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: FIRST DEPARTMENT — LAWYER SHOULD APPEAR.

PEOPLE OF THE STATE OF NEW YORK, — NAGLER MUST SIGN.

Respondent,

- against - — WILL ~~HAVE~~ GOTTE GET

(See other Papers)

~~GLADYS HARRINGTON AND RAPHAEL MARTINEZ,~~ AFFIDAVIT

Defendant-Appellants

---x INDEX NO. 40860/66

STATE OF NEW YORK) SS.:
COUNTY OF NEW YORK)

STEPHEN M. NAGLER, ESQ. being duly sworn, deposes, and says:

1. I am an attorney for the ~~Congress of Racial Equality~~ above entitled appellants and was until June 1st, 1965, and an associate of ~~George Schiffer, Assistant General Counsel of that organization~~ Carl Rachlin Esq. one of the attorneys who appeared for defendants below, I have discussed this case with other trial counsel, and as such I am familiar with the facts ~~in this case~~ herein.

2. For the purposes of the above entitled matter, I am associated with Nathaniel Mitchell, Esq. who represented the above named defendants at their trail, before the Hon. Francis X. O'Brien, Judge of the Criminal Court of the City of New York, in the County of New York, on February 14th, 1964. The defendants were convicted of violating § 2036 of the Penal Law.

3. The failure to prosecute this appeal in due time is explained by the fact that counsel believed that this was one of several cases included in a stipulation entered into with the District Attorney of New York County to delay appeals pending a final determination in the cases of People v. Penn and/or People v. Lawson.

4. Certiorari in the case of People v. Penn is now being sought from the Supreme Court of the United States.

5. The case of People v. Lawson was decided by the Court of Appeals of the State of New York in June, 1965.

2. The defendants-appellants were arrested on or about the 1st day of August, 1963. Their cases were tried on August 23rd 1963 in Part IIB-1 of the Criminal Court of the City of New York, County of New York, before Hons. Benjamin Gassman, Evelyn Rickman and Arthur Dunkalf, Judges. All defendants-appellants were found guilty under §§ 2036 ~~and~~ of the Penal Law and all defendants except Blick and Frieder were also convicted of violating §1851 of the Penal Law. All were sentenced on that date to 30 days (suspended sentence) in the City Prison ~~on~~ on the charge of violation of §2036 and those convicted of violating §1851 were given a 10 day sentence in addition.

3. An appeal ~~from~~ to this Court was taken by filing a Notice of Appeal in the office of the Clerk and serving a copy of such Notice on the District Attorney of New York County on or about the 12th day of September, 1963.

4. A stipulation was then entered into by which the disposition of the within appeal would be determined by the result of an appeal in the case of People v. Lawson, 16 N.Y. 2d. 552 (1965).

5. On or about, October 21st, 1966 ~~the~~ appellants moved this court for an order allowing them to appeal as poor persons. The Court granted the motion at the following term and ordered the minutes to be prepared at the expense of the state.

6. During the months which followed, I made repeated ~~efforts~~ inquiries regarding the minutes and was informed that because of their great length, it would take a considerable time until they were reproduced. The minutes did not reach me until approximately one year after leave had been granted to appeal in forma pauperis. ~~that~~ and since that time ~~I have been~~ my circumstances had changed and I ~~have~~ was actually engaged in ~~the~~ trial and appeals including, Hamell v. Tobias (U.S. Supreme Court - 1968 - still pending); Steel v. Taft (U.S. Ct. App., 5th Cir. - 1967 - decision pending) Abernathy v. Wyman (Sup. Ct. of New York, App Div 1st Dept. - pending argument

The Court of Appeals affirmed without opinion the decision of the Appellate Term, First Department dismissing the charge of violation of §§ 2036 of the Penal Law. People v. Lawson, 44 Misc. 2d, 578, 254 N.Y.S. 2d 300 (1964). The Appellate Term stated that § 2036 (unlawful intrusion) did not apply if a person entered premises lawfully, although he remained against the will of the owner.

6. In the present case, defendants entered a public building lawfully and remained after being asked to leave.

7. The conviction of the defendants for violation of § 2036 of the Penal Law was therefore an error and should be reversed. Deponent believes, as indicated in paragraph five(5) of his affidavit attached to the motion papers for leave to

10. No previous application has been made to this or any other court for the relief sought, except for a request for an enlargement of time ~~for~~ requested as part of the relief

WHEREFORE your deponent prays that an order be granted setting aside the order dismissing the appeal herein pursuant to Rule III (2) (c), Rules of the Appellate Term, First Department and for a further order granting an extension of time in which to perfect the appeal.

in the motion for leave to Stephen M. Kozler appeal as a poor person.

Sworn to before me

this ~~6th~~ day of July 1968.

RITA L. CARRINGTON
NOTARY PUBLIC, State of New York
No. 41-0581325
Qualified in Queens County
Cert. filed in New York County
Term Expires March 30, 1967

appeal in forma pauperis (filed herein on or about October 21st, 1966) and incorporated herein by reference, that the conviction for violation of § 1854 of the Penal Law was incorrect since there is no proper underlying charge because the arrest was wrongful.

ARA
ABORTION REFORM ASSOCIATION, INC.
149 West 93 Street, New York, N. Y. 10025

ELIZABETH ELKIND
Executive Director
(212) 663-3175

150 West 94th Street
New York, New York 10025
February 4, 1969

Carl Rachlin, Esq.
164 Madison Avenue
New York, New York

FEB 5 1969

Dear Mr. Rachlin:

I have spoken to Al Blumenthal, and he has told me of his conversation with you.

I hereby authorize you to proceed with whatever has to be done on my case. May I add that I am very appreciative of what has already been done. I had been assured by Percy Sutton years ago that I was in the clear, and as of last week, when I last spoke to him, he was still of that opinion. He had obviously confused this case with another.

I am sorry that there seems to have been diffidulty in getting in touch with me. The fact is that I have been listed in the Manhattan directory for the past five years, under my full name, and could have been reached at any time. The address of record in my case is the same address where my parents still reside, and the notice ordering me to appear on February 11 is the first communication I have received regarding this case since 1963.

If for any reason you find that you cannot appear personally on Tuesday, and must send someone else from your office, I would like to be informed. My home telephone number at home is MO 6-6302. I am enclosing my business card, and I have an answering service on that telephone from 9 to 5.

Please excuse the paper, typing, etc. I am at this moment in Albany on a lobbying trip, but I am anxious to write to you without further delay.

I will see you in court on Tuesday.

Sincerely yours,

Elizabeth Elkind

Elizabeth Elkind

SCHOLARSHIP, EDUCATION AND DEFENSE FUND FOR RACIAL EQUALITY inc.
164 MADISON AVENUE
NEW YORK, N.Y. 10016
(212) 532-8216

Certified Mail

February 13, 1969

Hon. Raymond J. Cannon
Clerk
Court of Appeals of New York
Eagle Street
Albany, New York 12207

Re: People v. Williams, et al.
Docket Nos. B-5813 through B-5819/63
Calendar No. Dec. 540, 384-M-63 Index No. 40860/66

Dear Mr. Cannon:

Pursuant to Section 520 of the New York Code of Criminal Procedure I hereby apply for permission to appeal to the Court of Appeals from that part of a decision of the Appellate Term, First Department dated January 23, 1969, which affirmed convictions for violation of Section 1851 of the Former New York Penal Law.

Shall we call Chief Judge Fuld's chambers directly for an appointment to hear the application, or is it made for us through your office?

Thank you for your courtesy.

Very truly yours,

Carl Rachlin

CR:rk
CC: Jerry Slater, Esq.
Assistant District Attorney for N.Y. County

Contributions are deductible for income tax purposes

■ *president:* Andrew E. Norman ■ *vice presidents:* William S. Ellis, Nannette Sachs ■ *secretary:* Ezra Levin ■ *treasurer:* Shelley Appleton ■ *executive director:* Marvin Rich ■ *leadership development director:* Ronnie M. Moore ■ *legal director:* Carl Rachlin ■ *BOARD OF DIRECTORS:* Nils R. Douglas, *chairman* ■ James Baldwin ■ Katrina McCormick Barnes ■ Allan Barton ■ Jonathan Bingham ■ Canon James P. Breeden ■ Robert Curvin ■ Charlotte Devree ■ Robert F. Drinan, S.J. ■ Michael O. Finkelstein ■ Doris Freedman ■ James T. Harris, Jr. ■ Claude Heckscher ■ Norman Hill ■ Arthur Kimmelfield ■ Dr. Archie Lacey ■ Jeremy Larner ■ Joann List Levinson ■ John Lewis ■ Leon Modeste ■ Henry Morgenthau, III ■ Dr. William Stuart Nelson ■ Edward Norton ■ Richard J. Schwartz ■ Elaine Slater ■ Rowland Watts

Napper v. Wyman (same); Baez v. Wyman (same), People etc. v. Hyland et al (Cum. Cty - King County - pending trial), People etc., v. Johnson (same); Adams v. Hughes (U.S.D.C., District of New Jersey - 1968 - pending trial); Pierce et al v. Appel, et al, (Superior Court of N.J., Chancery Div. - 1968 - pending); and approximately 75 administrative proceedings pending in various states of completion before the Department of Social Services of the State of New York.

7. In addition, during the month of May, 1968, I was in the process of changing offices. I am now Executive Director of the American Civil Liberties Union of New Jersey with offices at 45 Academy Street, Newark, New Jersey. The change was in preparation for several months preceding May, 1968.

8. (Back to original).

Aug 8, 1968

People v. Roark 31 - dictum - "holding gives
" acquittal gives the right to resist
per se."

Limp - actual resistance T.
Judge Weaver - Crim Ct.
excessive punishment.

Tulsa L.J. 3:40 - JA 166

Amer. U.L.R. 17:350 MAR 168

- Defendants were arrested when in a sitting position. They did not assume a sitting position to resist arrest. The record does not indicate that they went limp

KATZ
290 NY 361
49 NE2d 482
174 NE2d 471
j 183 NE2d 320
359 F2d 3 1011

In People v KATZ, 290 NY 361, 49 NE2d 482 (1943), rev'd reversed conviction for 2nd degree assault,

Whoever "[w]ilfully and wrongfully wounds or injures or grievous bodily harm upon another, either with or without a weapon" is guilty of second degree assault. In holding that reversible error was committed by failing to instruct the jury over objection, that a specific intent is necessary, the majority stressed that "as the statute reads, the requirement as to intent is co-extensive with the act prohibited." 49 NE2d at 484

- D.A doesn't urge suit - cannot.
- start story
- can arrest acts can't pun
- A doesn't have benefit of time of Lawsn

- While presumed people know law
- such guest - law. If start charged 3 days,
- sec. guest of specific intent
- can have spec intent
arguendo. these acts can't assert can say they had spec intent if jury acts would by acts
- Mg. very min. rea found to separate

---

can you have willful conduct specific intents
arrested for act - had no rights to be arrested for

— Nothing in record to
show crime committed

Resist - Keegan 65 SCt 1203, 325 US 478
89 L. Ed 1745
"**Officer** 40 NYS 2d 751, 754, 265 AD 767
Pugle v. Fidler. 280 AD 698

— Comity Dirs
— OSNAD
— Silverman
— Frank
— Resist & Friend

- Rt. to Resist - believed arrest unlaw
- whether actually resisted
- whether single act
- intent of Δ's (willfully)
- belief of Δ's
- double punishment.

195.05

(Make probable)
- Willfully.
by untaming
seated.

Double punishment falls when Z036 fails
mens rea req to intend not
& resist

- passive resist.
Delaying an officer.
Wilfull - as mens rea
Perkins

wilfull could mean specific intent
to obstruct
intentionally
687 - 691. - NY 1910

to destroy. going limp & this case
People v Katz - Argue willfully
290 NY 381 means
49 NE2d 482 specific
- must d intend to
delay officers
- much different than
limp when dragged

People v. GALAMISON
248 NYS2d 358
42 Misc.2d 387 } same cite.
no. further citations

People v. Munton
283 NYS2d 73.
54 Misc2d. 552

People v. Cheney 307 N.Y. 308, 311
J. Fuld.—

IF FORCE IS NECESSARY to prevent an unlawful arrest, then force may be ~~applied~~ employed, the one limitation on its exercise being that the victim may NOT pursue his counterattack merely for the sake of revenge or the infliction of needless injury."

People v. Knight 228 NYS2d 981, 987
35 M2d 216
65 MLR 1152s
252 S2d 2 216
282 S2d 1001
284 S2d 674
54 Cal 21
93 MLR 1287n
49 CAR 332

People v. LAWSON
254 NYS2d 300 (Sup Ct AT)
260 NYS2d 661 (1965
a 208 NE2d 466
S 238 S2d 839
d 257 S2d 780

People v. CHERRY 307 NY 308, 121 NE 2d 238

People v. DREARES 15 AD 2d 204, 221 NYS2d 819, aff'd. 11 NY2d 906, 228 NYS2d 467, 182 NE2d 812

221 NYS2d 819 (1st Dept) aff'd 11 NY2d 906
a 228 S2d 467
a 18 NE2d 812
229 S2d 3 217
229 S2d 3 325
d 230 S2d 3 36
✓ 230 S2d 3 37
232 S2d 3 19
237 S2d 3 99
d 239 S2d 3 627
243 S2d 3 248
245 S2d 3 59
247 S2d 3 735
248 S2d 3 362
h 253 S2d 25
h 253 S2d 4 28
254 S2d 3 369

202 NE 3 911
? f 260 S2d 3 894 OFFENSE CRIME
? ✓ 265 S2d 3 861 DISCON CONVICT
— 266 S2d 3 548 VOID WARRANTS
✓ d 268 S2d 3, 152 upheld NG
271 S2d 2 352 upheld
✓ e 283 S2d 3 75 — NG probable JURY
249 FS 3 201
268 FS 1 861

actual resist Δ didn't know Cop

Schmerber

upheld dismissal Not applic to traffic viol.

Sleep Supt 68 upheld

upheld
can't assault after arrest complete

cited as Rule

denied motion to Sup upheld

unlawful arrest upheld

In State v. Welch, 37 Wisc. 196 (1875), defendant refused to obey the orders of a policeman and instead chased away horses which the officer was supposed to replevy. The court construed the word "resistance:"

> "To bring a case within the statute, it is not enough that the execution of process is opposed or interrupted or hindered or prevented; the officer must be resisted . . . . And the resistance must be active and direct towards him." 37 Wisc. at 201.

In Moses v. State, 6 Ga.App. 251 (1909), the defendant thinking that his friends would go his bail and would be waiting at the stationhouse for him voluntarily drove the sheriff to the jail in his own buggy. When they both realized that no one was there to go his bond, the sheriff ordered him out of the buggy and told him he was going to take him into the jail. The defendant then began to curse and said he was not going to jail. The officer took hold of him but the defendant clung to the seat and tried to jerk loose. He made no threat of violence nor did he attempt in any way to assault the officer. The court in reversing his conviction for resisting arrest said:

> "He simply protested against his unreasonable imprisonment and emphasized his natural objection to being incarcerated under the circumstances by refusing voluntarily to go to jail. Under all these circumstances we think the defendant's conduct was neither unwarranted nor unlawful and that his conviction was unauthorized."

Many other cases hold that "resistance" implies the use of force: Harrison v. State, 26 Ga. App. 645 (1921); United States v. Jose,

63 F.951 (1894) ("resistance" requires interference with intent to prevent the execution of process).

Words such as "interfere" and "obstruct" have also been held to demand affirmative conduct or the use of force particularly in a criminal context. D.C. v. Little,70 S.Ct. 468 (1950) (remonstrating with health inspector and refusing to open door to him); Regina v. Dagly,29 CR 55 (NS)(1958); Regina v. Senenwick, 14 WWK (NS) 523 (1955).

California Penal Code §148, employing the words "wilfully resists, obstructs or delays," is substantially the same as New York Penal Law §1851 and has been applied consistently and almost exclusively to cases of resisting arrest. (California has no equivalent of N.Y. §242 (5)). All the reported cases under the California statute have involved some assault on the arresting officer: People v. Bugg, 79 Cal.App.2d 174, 179 P.2d 346 (1947)(battery on two officers); People v. Powell, 99 Cal.App. 2d 178, 221 P.2d 117 (1950)(assault on officer breaking up a crowd).

The provisions on resisting arrest in the recently enacted New York Penal Law, to go into effect in 1967, demonstrate that in the arrest situation any delay or obstruction is not enough:

> "A person is guilty of resisting arrest in the second degree when he intentionally prevents or attempts to prevent a peace officer from effecting a lawful arrest of himself or another person." Proposed Penal Law §210.40 (emphasis added).

It would be a rather foolish demonstrator who thought he would prevent his arrest by going limp.

Considering the exigencies of practical law enforcement, it would seem unlikely that in several hundred years of making arrests, or even since 1881, there was no instance in which an arrestee resisted, obstructed, or delayed without using force

on the arresting officer. The instances in which the arrestee objected and had to have his arm twisted must be too numerous to list, but there is not a single reported case in which such resistance was prosecuted under §1851. It was not until 1962, however, in a demonstration case, People v. Knight, 228 N.Y.S. 2d 981 (N.Y. Magistrate's Ct.), that passive resistance was proclaimed to be"nontheless resistance." 228 N.Y.S.2d at 987.

A contrary doctrine to the Knight case has been recognized in other demonstration cases, unfortunately unreported. Prior to the Knight trial another magistrate dismissed several charges growing out of the same demonstration and involving much the same facts as the Knight case. People v. Kelley, Garrett, Trichey (Manhattan Adolescent Ct. March 30, 1962). Magistrate Michael Potter held that the actions charged did not constitute a violation of §1851. A San Francisco municipal court in California v. White (June 1, 1960) dismissed sixty-two charges of resisting arrest because the demonstrators had merely gone limp.

In People v. Lynch, (Suffolk County Court, April 12, 1965), the defendant sought entry to a migrant workers' camp on county property. He was requested by the Under-Sheriff not to enter and when physically restrained by deputy sheriffs, the defendant went limp. The court approvingly said:

> "Both sides agree that no force was used to prevent the defendant entry on the farm, but it is obvious that the only reason it wasn't was that the defendant "went like limp" upon contact with the deputies, a sensible solution to the antithetical contrast between the fact and the theory."

When a group of demonstrators goes limp, the only harm that results is that the police must endure the annoyance of carrying or dragging the arrestees. As there is no duty to actively

cooperate with the arresting officer, the demonstrator is doing nothing that could be considered criminal. Annoying a policeman is not a crime; it is not designated by the legislature as such, nor can it, in our society, be considered malum in se. Summarizing the principles of criminal law, Oliver Wendell Holmes said:

> "In the characteristic type of substantive crime acts are rendered criminal because they are done under circumstances in which they will probably cause some harm which the law seeks to prevent."
> "The test of criminality in such cases is the degree of danger shown by experience to attend the act under those circumstances." The Common Law, 75.

What, then, is the danger to society of passive submission to arrest? The annoyance to the police, the slight delay or obstruction is not of such a magnitude as can be considered criminal. Any statute that employs words admitting degree, such as "delay" or "obstruct," must if literally read cover a range of fact situations that the statute was never intended to reach. Merely remonstrating with, or asking a question of, a policeman to some extent delays him, but it would be absurd to construe all such conduct as criminal. The established use of the word "obstruct" in Penal Law §1530 (Public Nuisance) bears out this point. The statute would make criminal "unlawfully doing an act. . . which . . . obstructs or tends to obstruct . . . a public park, square, street, or highway." Yet it has been established that for the actor to be subject to criminal sanctions, the obstruction must measure up to standards such as "systematic," "permanent," and "substantial." (See memo on Public Nuisance).

The maxim De minimus non curat lex, the law cares not for trifles, is clearly applicable to the demonstrators' going limp.

This is especially so because it is criminal and not civil liability that is here being determined. The passive submission of the demonstrator who goes limp lacks both the requisite intent and the degree of resistance, delay, or obstruction to be reached by §1851.

In summary, if the legislature sought to extend the common law crime of obstructing justice to include passive resistance, it should have done so in specific, certain terms. "Resistance" and similar words used in statutes such as N.Y. Penal Law §1851 imply the use of force or some affirmative conduct with the intent of preventing the officer from effecting the arrest. Passive resistance, going limp, is not "resistance" within the meaning of the statute.

VI. IF §1851 CAN BE CONSTRUED TO PROHIBIT PASSIVE RESISTANCE, IT IS SO VAGUE AS TO AFFORD NO ASCERTAINABLE STANDARD OF GUILT AND THEREFORE IT COMES WITHIN THE VOID FOR VAGUENESS DOCTRINE OF SCREWS V. UNITED STATES, 325 U.S. 91 (1945).

If the words "wilfully resists, delays or obstructs" are not construed as requiring some affirmative conduct, then any intentional non-cooperation would be grounds for criminal conviction. All acts or omissions not directly cooperative in some measure obstruct and delay. "The requirement that the act be wilful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain." 325 U.S. at 102. Here, demonstrators (and many courts) who act with the specific intent of not cooperating with their own arrest are not aware that they are doing "that which the statute forbids." 325 U.S. at 104.

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions. . . . Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act. . . . or in regard to the applicable tests to ascertain guilt." Winters v. New York, 333 U.S. 507, 68 S.Ct. 665,670 (1948).

Standards of proscribed conduct must be particularly definite where the conduct forbidden is an omission. United States v. Spector, 99 F.Supp. 778 (D.C. Calif.), reversed on other grounds, 343 U.S. 169, 72 S.Ct. 591, rehearing denied, 343 U.S. 591, 72 S.CT. 1040 (1952).

MRG

BEFORE

State of New York vs Goins & 135 Club, Inc. vs City of New York et al
(2 related cases - Police Brutality)

Dec. 1965 - Feb. 1967

Box 40
Folder 15

Statement of Harry Zeid(Home 49 Murdock Ct. Brklyn, NI 87691: bus. 135 Club, I_ c. 135-28 Roosevelt Ave, Queens FI 99859)

On Dec 24 1965, at approximately midnight, two policemen(Driscoll #2858) and Brennan(#6892) entered premises of 135 Club Inc(135-28 Roosevelt Ave, Flushing) and upon entering premises they shoved and pushed x patrons out of their way to go into the dining room. They went into the check room and started to search the coats and the check room. Elisjah Keys, floorman and in charge of the check room, asked officer Dirscoll what was the matter. Driscoll called Elijah a "black son of a bitch" and started to beat him. Driscoll hit Elijah with his gun on the forehead. Henry Tarrant, manager, working behind the bar ran to the back and told Driscoll Elisjah worked in the premises and wanted to know why he was hitting Elijah. Driscoll pointed his gun at Henry Tarrant and threatened to shoot his "black bastard's" head off. At this point Mr Driscoll shot his gun into the ceiling. Then Driscoll threatened to shoot any "black bastards" who spoke to him. James Tozer, a customer, ran to 'phone the police and Offiver Brennan pulled him from the 'phone and told him to mind his own business. At this time Joe Lasky, a waiter, 'phoned the police at 44401234 and told them that two cops who were drunk were beating an employee for no reason. Police responded with radio cars including Capt. Carrol, capt. of the 109th pct. Eddie Collins, bartender, told Capt. Carrol that these two officers were intoxicated . Capt. Carrol told Eddie Collins he was no expert to determine if the two cops were intoxicated. After Elijah Keys was taken to the 109th pct, Manager Henry Tarrant went to the 109th pct and asked Capt. Carrol to give the two cops a test to see if they were intoxicated and also to file a complaint against the two cops. Both requests were refused and Henry Tarrant was told to leave. Two witnesses, Bobby Courses, 35-13 103 St and Barbara Ashley, told the police at the precinct the Elijah Keys was attacked by the two cops for no reason.

William Goins, a musician at the 135 Club, went to the precinct as a witness and was immediately arrested, charged with felonious assault on a police officer and disorderly conduct. At the hearing (Sat. Dec 25, Judge Mataruth, Queens Dist Ct) 2 affadavits were submitted against Goins, one for felonious assault and one to drop all charges against him. (Keys was charged with felonious assault against a police officer(Driscoll). (Bail was set for both Keys and Goins at $500; posted by Mr Zeid. Trail is set for Queens Dist Ct, Jan 4,10am) We have about 7 witnesses who in their opinion feel these two cops were unfit for duty and that the attack on Elijah Keys was unwarranted.

After the hearing in court, Brennan was observed by myself going into the Tiki Bar on Queens Blvd. and ordering liquor at the bar; Brennan was then in uniform.

This was Lasky

Marvan Smith , witness & knocked down by police as they entered dining room
1408 36th Ave LIC
784-2158

Joe Lasky
32-39 107 St
651-0148 — New # unlisted

Bobby Courser
35-13 103 St

Barrabara Ashley
35-13 103 St

Marvin Wheeler
134-08 Roosevelt Ave
IN 3 1127

Henry Tarrant 33-45 94 St
HE 9 9712

Eddie Collins
104 E 124 St
~~HE 9-2739~~ — wrong #

December 28, 1965

Hon. Frank O'Connor
District Attorney
Queens County
126-05 Hoover Avenue
Queens, New York

RE: 135 Club, 135-28 Roosevelt Avenue

Dear Mr. O'Connor:

Enclosed is a copy of a letter delivered to Commissioner Vincent Broderick yesterday concerning the 135 Club.

We urge a complete investigation by the Grand Jury in this matter, particularly the arrest of Mr. Goines in the police station where he had gone to make a complaint.

Distressing also is the fact that we have been advised that at least one of the policemen involved in this matter had a reputation for drinking.

Yesterday a Patrolman Wales of the 16th Division presented himself to the Manager of the 135 Club, Mr. Henry Torrant, who was given a summons for dirty or insufficient towels. We had discussed this with Mr. Zeid, the owner, and he understood this might happen. So, it came as no surprise to him when his manager received the summons.

We are prepared to cooperate with you to the fullest in any investigation conducted.

In view of your assuming your new duties on January 1, 1966, we are taking the liberty of sending a copy of this letter to your successor, Mr. Hentel.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs
Enc.

M E M O R A N D U M

TO: MESSRS. Wiley, Gartner, Harris, Rich, Nagler

FROM: Carl Machlin

December 28, 1965

RE: 135 Club Incident, Queens

1) Alan advised me this morning that, as we had predicted last night, a Patrolman Wales of the 16th Division came to the 135 Club and gave them a summons either for dirty or insufficient towels in the men's room.

2) I immediately called Commissioner Broderick's office and was told he would call back a little later.

3) In the meantime, Mr. Zeid called; Alan being out, I spoke to him and confirmed to him what Alan and I had discussed, that Mr. Zeid or his attorney should also make a complaint to the police officially. Mr. Zeid's attorney is a Mr. Leonard Gordon, PA 7-2788, a former police lieutenant.

4) Within moments thereafter, Deputy Inspector Sachon called on behalf of the Commissioner in response to my calling a little while previously, and asked if he could a message from me to the Commissioner about what I wanted to talk. I told him that Patrolman Wales had given a summons last night and had promised the manager he would be back again tonight. He appeared to be interested and went out of his way to say that the Commissioner would make certain that there would be a full investigation and justice done.

5) He asked me to give him a copy of any reports that we prepare on this matter that would help them in their investigation. This I promised to do.

March 9, 1966

Mr. Ted Poston
New York Post
75 West Street
New York, N. Y.

Dear Ted:

The attached memorandum is a fairly detailed account of the incidents which have occurred at the 135 Club stemming from the initial police brutality case on Christmas Eve. I know that you have the patience and I hope that you will have the time to wade through it. It is thoroughly a horror story involving harrassment not only by police officers but also by Health Department personnel. I am very anxious to talk to you about where we must go from here.

Very truly yours,

SMN:tp
ATT:

Stephen M. Nagler
Associate to the
General Counsel

MEMORANDUM

TO: Ted Poston - New York Post DATE: March 10, 1966

FROM: Stephen M. Nagler
Associate to the General
Counsel - C.O.R.E.

RE: Club 135, Roosevelt Ave.
Flushing, New York

1. On Christmas Eve, 1965 two police officers, Patrolmen Brennan and Driscoll of the 109th Precinct entered the Club 135 with an unidentified woman. About an hour earlier a fight had occurred at the club between two men, one of whom wielded a knife. It appears that the woman mentioned above was a member of the party which included these two men. At any rate the incident was brought to a close through the intervention of the bouncer, Mr. Elijah Key, and other employees and patrons. Both participants in the struggle had been ejected from the club at least 45 minutes prior to the entry of Officers Brennan and Driscoll.

When the officers entered the club they grabbed a customer sitting at the front of the bar near the entrance and pulled him outside. They released him a few minutes later and he re-entered the bar. The police officers followed with the woman and roughly pushed their way through the front room of the bar into the rear dining room. The manner in which they carried themselves and their appearance and the odor of their breath indicated to witnesses that they had been drinking. They passed directly through the rear dining room of the club to a small coat room at the back and set upon the bouncer Elijah Key who was working there. They did not bother to stop to question the manager of the bar, the bartender, or any one else for that matter about the earlier incident or any other matter, but immediately started to scuffle with Key in the coat room. After a few moments they dragged him from the coat room and placed him on one of the bench seats in the rear dining room of the club. Throughout this Key made no effort to resist and tried only to tell them that they had the wrong man. Attempts by the patrons and by the manager of the bar, Henry Tarrent as well as the waiter, that Mr. Key hadn't done anything resulted only in shouts and pushing by the officers. After Key was placed horisontally on a bench seat and Patrolman Driscoll had placed his knee in Key's stomach, Driscoll drew his gun and ordered everyone to keep back. Again the demeanor of the officers as well as their breath indicated to witnesses that they had been

drinking. They freely kicked chairs and tables aside and reeled around considerably. At this point the waiter called Division Headquarters and reported, as he put it, that "two drunken police were breaking the place up." Shortly afterwards several police cars arrived. A few moments before the other police came in Patrolman Driscoll fired a shot into the ceiling at which point the patrons started to run out of the dining room toward the front of the bar. When the other officers entered Key was placed in custody and officers Brennan and Driscoll were taken down to the precinct. Several officers including Capt. Carroll of the 109th Precinct began to investigate the incident. On being told by Henry Tarrent and others that Brennan and Driscoll were drunk the officers responded that neither Tarrent nor the regular bartender (who was also a witness) nor anyone else present was capable of determining that fact. Capt. Carroll specifically rejected Tarrent's request that the officers be given a "drunkometer" test.

II. William Goins one of the members of the trio which plays at the 135 Club and who was in no way involved in the incident was so incensed by what had occurred that he decided that he was going to go down to the109th Precinct to file a "civilian complaint." One of the other members of the trio drove him down to the precinct. When Goins entered he found a Lieut. Bass sitting at the desk and told him that he wished to file a complaint against two police officers. Patrolman Brennan who was near by overheard him and proceeded to arrest him as a participant in the earlier incident. Brennan and Driscoll say that they were unable to apprehend him at the Club because he ran away. Key is charged with assault on a police officer (assault in the 2nd degree). Goins is charged with assault in the 3rd degree and interfering with an officer. The owner of the club Mr. Harry Zeid called CORE on the following day and on Sunday, December 26th, 1965 Herb Callender of CORE"s Organization Department and I went to the club to examine witnesses. We spoke to at least 12 people including Key and Goins and made a tape recording of our interviews.

III. Carl Rachlin, CORE's General Counsel, wrote to the then Police Commissioner, Vincent Broderick, demanding an investigation. A quick response come from Inspector Sachsen of the Police Commissioner's Confidential Investigating Unit who conducted an investigation. Nothing has resulted from the investigation and the charges against Key and Goins are still pending. The Inspector has said that he will not order the officers to drop their charges even against Goins although they appear capricious.

IV. In the days following the incident the 135 Club received several visits from local police officers who "inspected" the club and presented summonses because the men's room had no towels. A complaint was made to Inspector Sachsen of police harrassment and the visits stopped.

V. On February 18, 1966 aniinspector from the Department of Health (Shield #330) visited the club. He informed Mr. Zeid that he came as the result of a "police letter." After a cursory inspection of the club he informed Mr. Zeid that everything was in order. The club had been thoroughly inspected on December 8, 1965 and no violations had been recorded against it. On February 24th, 1966 the same inspector who had visited the club on February 18th returned and informed Zeid that he had to find violations. He said that his supervisor had ordered him to return and come up with something. Apparently all of this resulted from theppolice letter which on the latter occasion the Health Department inspector "flashed". This time the inspector succeeded in finding three violations: 1) roach infestation, 2)rubble in the basement, 3) dirty dishes in the sink. The first two of these would have existed on December 8th and would have led to citations at that time. Furthermore, it is highly unusual to have inspections by the Health Department more frequently than once in six months.

VI. On March 4th, 1966 Zeid was in the criminal court on one of the summonses. While in court he heard mention of another case which involved the 135 Club. This case involved the mugging of a man named Fred Branch allegedly by a Mr. Darnell Pendelton. It seems that the two men had been drinking in the 135 Club. They left the Club and proceeded to the Station Bar across the street and continued their drinking. Mr. Branch alleges that they walked about two blocks away and that Mr. Pendelton mugged him in an alley. Lt. Bass of the 109th Precinct however, (who booked William Goins) submitted a "Form 49" which he filed with the New York State Liguor Authority alleging that the mugging had taken place <u>in</u> the 135 Club. This is contrary to the statements of all concerned including two detectives who subsequently investigated the alleged mugging.

The only conceivable purpose behind this move by Lt. Bass as well as the "police letter" to the Health Department is to harrass Zeid and others in his Club for their protests about the Christmas Eve incident. It involves from start to finish the vilest forms of official conduct.

NAT H. HENTEL
DISTRICT ATTORNEY

Office of the
District Attorney
of Queens County

QUEENS CRIMINAL COURT BUILDING
126-05 HOOVER AVENUE
KEW GARDENS (JAMAICA 15), N. Y.

ADDRESS YOUR REPLY TO THE DISTRICT ATTORNEY, ATTENTION OF MR. S. Peters
GRAND JURY SECTION

May 11, 1966

Barry Ivan Slotnick Esq.
15 Park Row,
New York City, N.Y.

People vs. WILLIAM GOINS - Bail

Dear Sir:

Our No. 725-66

Enclosed please find Waiver of Immunity forms requested by you, in quadruplicate.

Upon completion, you are to present the original and two copies to the County Clerk of Queens, (General Court House, 88-11 Sutphin Boulevard, Jamaica, New York) for filing and certification. Please forward the two certified copies to this Bureau as proof of such filing; one copy will be transmitted to the Supreme Court, Criminal Term for you.

This will entitle you to notice of the time and place of the Grand Jury Hearing.

If service of the certified copy on this office is not made before the case is placed on the Grand Jury Calendar, you will not be notified, and the defendant will not be heard by the Grand Jury.

Very truly yours,

NAT H. HENTEL
District Attorney

BY: F. PETERS
Indictment Bureau

Neil Fabricant

NAT H. HENTEL
~~CHIEF ASSISTANT~~
DISTRICT ATTORNEY

Office of the
District Attorney
of Queens County

QUEENS CRIMINAL COURT BUILDING
126-05 HOOVER AVENUE
KEW GARDENS (JAMAICA 15), N. Y.

ADDRESS YOUR REPLY TO THE DISTRICT ATTORNEY, ATTENTION OF MR. S. F. PETERS
GRAND JURY SECTION

Sept. 15, 1966

BARRY IVAN SLOTNICK, ESQ.,
15 PARK ROW,
NEW YORK CITY, N.Y.

Sir: Re: Our No. 725-66

Pursuant to the provisions of Section 250 of the Code of Criminal Procedure as amended, you are hereby notified that the defendant, WILLIAM GOINS will be heard by the SEPTEMBER, 1966, Grand Jury, on the 22nd day of September, 1966, in the Grand Jury Room, at the Criminal Courts Building, 125-01 Queens Blvd., Kew Gardens, Queens County, New York, on the 5th floor, at 1:30 P.M. on the said day, or as soon thereafter as the said hearing shall be held.

Very truly yours,

NAT H. HENTEL
District Attorney
County of Queens

ab BY: FRANCES PETERS
INDICTMENT BUREAU

cc: Mr. William Goins,
132-35 Sanford Ave., Flushing, N.Y.

P.S. WE NOTE THAT YOU HAVE NOT AS YET FILED CERTIFIED COPIES OF THE WAIVER OF IMMUNITY ON BEHALF OF YOUR CLIENT. KINDLY CALL THIS OFFICE UPON RECEIPT OF THIS LETTER.

LAW OFFICES
BARRY IVAN SLOTNICK

15 PARK ROW
NEW YORK CITY
NEW YORK 10038

BEekman 3-5390

September 19th, 1966.

RE: People of the State of New York
v. WILLIAM GOINS

PLEASE TAKE NOTICE, that your appearance is requested before the Grand Jury of the County of Queens, on September 22nd, 1966,

The proceeding will take place on the 5th floor of the Criminal Courts Building, located at 125-01 Queens Boulevard, Kew Gardens, Queens, New York.

Please be there at 2:00 P.M.

Very truly yours,

BARRY IVAN SLOTNICK
BIS:jmu

LAW OFFICES
BARRY IVAN SLOTNICK

15 PARK ROW
NEW YORK CITY
NEW YORK 10038

BEekman 3-5390

November 18, 1966

William A. Goins
132-35 Sanford Avenue
Flushing, New York

Re: PEOPLE OF THE STATE
OF NEW YORK
v. WILLIAM GOINS

Dear Mr. Goins:

I am pleased to inform you that the Grand Jury has refused to indict you in regard to the above matter.

Therefore, I wish you the best of luck in the future, and was very happy to represent you.

Very truly yours,

BARRY IVAN SLOTNICK

BIS:ab
CC:
Scholarship Education &
Defense Fund for Racial Equality
150 Nassau Street
New York, New York 10038

Harkavy, Tell & Mendelson

Attorneys at Law

ISRAEL HARKAVY (DEC'D.)
BENJAMIN TELL
JACOB MENDELSON
IRA B. HARKAVY

1501 BROADWAY
NEW YORK 36, N. Y.
—
LACKAWANNA 4-6475

February 23, 1967

Personnel Division of the Police Department
of the City of New York
240 Centre Street
New York, N. Y.

Gentlemen:

We wish to serve witness subpoenas upon the following Patrolmen.

Will you please advise us as to what Precincts they are now located at and where we may find them:

James Driscoll, Shield No. 2858, assigned to the 109th Precinct on December 24, 1965.

Thomas Brennan, Shield No. 6892, assigned to the 109th Precinct on December 24, 1965.

John Wales, Shield No. 22762, assigned to the 16th Division on December 27, 1965.

Patrolman Gardello, assigned to the Roosevelt Avenue and Main Street area, on December 28, 1965.

Thank you for your cooperation.

Very truly yours,

HARKAVY, TELL & MENDELSON

IBH:EPL

BY:

February 9, 1967

Police Department
240 Centre Street
New York, N.Y.

ATT: PERSONNEL DIVISION

Dear Sirs:

We represent 135 Club Inc., the plaintiff in an action against the City of New York, James Driscoll, Thomas Brennan, John Wales and "John" Gardello. The last four names are Police Officers or were such at the time the cause of action accrued in favor of the plaintiff.

The Shield numbers of the Patrolmen are as follows:

James Driscoll, Shield No. 2858
Thomas Brennan, Shield No. 6892
John Wales, Shield No. 22762

We do not have the Shield number for Patrolman Gardello.

Will you please advise us of the home addresses of the said Patrolmen so that service of the summons can be effected upon them.

Thank you for your cooperation.

Very truly yours,

HARKAVY, TELL & [illegible]

BT:EPL

BY:

Harkavy, Tell & Mendelson

Attorneys at Law

ISRAEL HARKAVY (DEC'D.)
BENJAMIN TELL
JACOB MENDELSON
IRA B. HARKAVY

1501 BROADWAY
NEW YORK 36, N. Y.
—
LACKAWANNA 4-8476

February 23, 1967

Steve Nagler, Esq.
150 Nassau Street
New York, N.Y.

Re: 135 Club Inc. v. The City of New York etal.

Dear Steve:

We have served the summons and complaint in the above matter against The City of New York.

We are attempting to serve the Patrolmen, but are unable to obtain their home addresses or their present assignments.

Enclosed herewith please find copies of letters sent to the Police Department.

Would your file reveal anything regarding addresses?

Thank you for your courtesy and cooperation.

Very truly yours,

HARKAVY, TELL & MENDELSON

BY: Ira B. Harkavy

IBH:EPL
enc.

Re: Goldway and William Briefs

1. The argument was written by Ken Gray for the facts in William case. Some names will therefore have to be changed for Goldway's brief.

2. Otherwise, I have indicated which section goes with which case, but the sections will have to be arranged correctly

3. Please send 2 copies of the brief when completed to Ken Gray
464 Bellevue Ave.
Yonkers, N.Y
(he wants to send one to LSCRRC)

~~to~~ Please send one copy of Goldway to Steve Hill
838 N. State Street
Chicago, Ill

QUESTIONS PRESENTED

1. Can the defendants be convicted for violating section [illegible] Penal Law, prohibiting intrusion on real property, because after being requested to leave, on previous occasions [illegible]

2. Can the defendants be lawfully convicted for violation of the Penal Law when the ~~state~~ People have not shown beyond a reasonable doubt that the defendants did not have a right to enter the premises in question?

3. Can the defendants be lawfully convicted for violation of section 2036 of the Penal Law when the People have not shown beyond any doubt any intent to intrude on real property by the defendants without lawful permission?

4. Can any of the defendants be convicted for violation of the Penal Law, for reasons stated, other than that the prohibition of section 2036 - the first

ARGUMENTS

The convictions of these defendants should be reversed by this court:

1. In accord with People v. Lawson, 44 Misc. 2d 578, 254 N.Y.S. 2d 300 (1964); 16 N.Y. 2d 552, 260 N.Y.S. 2d 661 (1965); People v. Collins, 44 Misc. 2d 430, 254 N.Y.S. 2d 182 (1964); 16 N.Y. 2d 554, 260 N.Y.S. 2d 662 (1965); and Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964); the defendants cannot be convicted for violation of section 2036 of the Penal Law because they did not intrude on real property within the meaning of the terms of the statute. At most, they remained on premises lawfully entered, after being requested to leave. Their arrest was specifically a result of their refusal to leave the premises which they entered lawfully (see below), after refusal to move. A refusal to leave a lawfully entered premises is not a violation of section 2036.

QUOTE → "While section 2036 of the Penal Law makes it a misdemeanor to intrude unlawfully on the land of another, it does not make it unlawful to remain, after being requested to leave, on premises theretofore lawfully entered. ... [The decision] 'cannot stand without offending the fundamental requirements of due process' (Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 [1964]." ←

People v. Collins, 254 N.Y.S. 2d 182, 183, 44 Misc. 2d 430 (1964).

This conviction cannot stand because it violates the basic principle that a criminal statute must give fair warning of the conduct it proscribes. The provisions of section 2036, as written, did not and could not have apprised the defendants that their conduct in refusing to leave violated the statute.

QUOTE → INSERT #1.

As Judge Gold said at p. 302, "It [Penal Law 2036] does not purport to make criminal a refusal to leave property which had been lawfully entered." Indeed, Judge Gold referred to the "proposed New York Penal Law," section 145.10, which makes a person guilty of criminal trespass "who knowingly enters or remains unlawfully on the property of another. He points out that " INSERT #2."

Therefore, this conviction must be overturned on the basis of precedent; the statute involved does not make a criminal violation a refusal to leave lawfully entered premises and it would violate due process if it purported to do so.

2. It seems clear that the defendants actually entered the premises in question lawfully (Note that this is not what they were prosecuted for in fact at the trial below). The foyer and stairway were in a building containing State offices and were therefore impliedly open to the public. The defendants moreover had business in the building's Press Room. They therefore did not lack "permission" to enter (the "permission" to enter the foyer of a public building is a meaningless term at all). They had a legal right to be there. This conviction cannot be sustained because the defendants in fact did not violate Penal Law 2036 in question. They entered the premises lawfully. Note that the defendants were not in fact arrested for unlawful intrusion.

3. Not only has the state not shown that the defendants in fact entered the premises unlawfully or without right or permission, but ~~the state has made no~~ even if we assume that the defendants had no right to enter the foyer of a public building, the state has not made out the required criminal intent. See People v. Wang 7 Misc. 2d 803, 163 N.Y.S.2d 995 (1957) where there was no evidence of criminal intent and the court reversed the defendant's conviction for criminal trespass. Indeed, the state introduced no evidence to indicate anything but that the defendants entered the building believing they had lawful business in the building's Press Room. This conviction must therefore ~~fail~~ be reversed because the state has not proved beyond reasonable doubt that the defendants "intended" criminally to violate the statute prohibiting the intrusion on real property.

4. Since the convictions for violation of section 2036 must fail, the convictions for violation of section 1851 must likewise fail. In an analogous situation involving section 1825 of the Penal Law, "Resisting an Officer," People v. Stevens ~~[illegible]~~, 16 Misc 2d 2d 162, 183 N.Y.S.2d 968 (1959), held that a conviction of resisting arrest for violation of an unconstitutional law must be set aside. See also (directly involving section ~~2036~~ 1851) People v. Hill 131 Misc. 521, 227 N.Y.S. 285 (1928), which likewise rings in point. (R) For the same reason, ~~the~~ defendant Morris' ~~sentence~~ ~~conviction~~ for parole violation must be set aside.

Proceedings Below

This action was brought by the People of the State of New York in the Criminal Court of the City of New York, Part 2-B: County of New York, against Gilbert H. Banks, Maurice Fredericks and Arnold S. Goldway, for violation of § 2036 of the Penal Law, alleged to have occurred on February 22, 1963, when the defendants ~~at~~ ignored an order to leave ~~the premises located~~ an apartment building located at 78 Manhatten Avenue, New York, New York. The defendants were convicted of the charge before a three-judge court, April 3, 1963, and sentenced to an indefinate period of probation, not to exceed three years, on May 13, 1963, by ~~Judge~~ Hon. Benjamin Cassman.

It has been stipulated that the decision in People v. Lawson, 16 NY 2d 552, 260 NYS 2d 661, will govern this appeal

Statement of Facts

On February 22, 1963, defendants Maurice Fredericks, Gilbert H. Banks, and Arnold Goldway sat down on chairs in the lobby of a five-story apartment building, located at 78 Manhatten Avenue, New York, N.Y. (24), and ~~at about 8:00 pm, the~~ containing about 59 apartments (24). ~~The~~ Defendants are Negroes (8). At about 8:00 pm., the superintendent of the building, William Bauch, approached them and, without asking if they were tenants in the building, or asking them their purpose (27), told them to leave (20). When defendants did not respond, the superintendent called the real estate manager, Robert Nieman (21), and again told defendants to leave. The defendants remained sitting (22), and the superintendent called the police,

who arrived about fifteen minutes later (22).
One of the officers requested each defendant
to leave, and when the defendants remained seated (23),
they were carried out of the building by the
policemen (23, 24, 31). They were then arrested (24).

5. The conviction of defendants Fredericks and Banks should be reversed ~~[illegible]~~ on the bases of ~~People v. Goldway~~, ~~that case involved~~ the same facts were present in that case, ~~and the~~ as in ~~conviction was reversed~~. the present one. The conviction was reversed by the Supreme Court, appellate term, in an order of March 10, 1966, Jan. No. 558 (1964). The basis for the reversal was stated to be the precedence of People v. Lawson, 16 N.Y.2d 552, 268 N.Y.S.2d 661.

~~Bar~~
Brown, short, dumbed,
pissed, tall, more drunk, beat Keys most

12/20

Irving McLean, patron / witness
cutting
Keys hit a night stick by both officers
Keys had no weapons
Keys dragged into d.r.; slapped etc

Joseph Lashey, waiter
cutting; ~~he~~ 2 men put out 1 by bouncer
police come in a lady who a two men
" " pushing Three Bar area / dr
" immediately to cloak rm.
Lashey called 440 1234
" to assist the people from the police"
mind arming
Lashey talked c Sgt at first
(Capt can c and be later)
Goin told sgt, while at club, he going to
make a cit comp vs 2 officers
in newspaper

Driscoll c 6'2"

On force about 2 1/2 years. He was the one who hit Key. Previously told local bookie he would blow his head off if he didn't pay up.

He also ~~was~~ fired at 2 kids on Parsons Blvd. driving a car.

Brennan c 5'8

On force for about 4 years. Transferred from west side after several altercations. 1 1/2 years ago he was picked up drunk on Roosevelt across from 135 Club.

Bannwarth (cont.)

He was written off as "sick" & given 5 days leave. He had earlier fallen asleep in Cluf 435.

Several days later he was mailed on a "leaving the scene" charge, which was not reported because he payed up.

Front

Back

Bar

Ballroom

Telephone Booths

Coat Room

Doorway

Doorway

Room Divider

Bar

SEDFRE STATE OF NEW YORK VS. GOLDWAG, ARNOLD et al, 1964-1965
(1964 WORLD'S FAIR DEMONSTRATIONS)

Box 46
Folder 20

Historical Society of Wisconsin

Please Retain Original Order

198—Summons, Supreme Court, with Notice. C JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS 80 EXCHANGE PLACE AT BROADWAY, NEW YORK

Supreme Court of the State of New York
County of QUEENS

THE PEOPLE OF THE STATE OF NEW YORK ex rel FRANK D. O'CONNOR, District Attorney, Queens County,

Plaintiff

against

ARNOLD GOLDWAG, et al.

Defendant S

Plaintiff designates

Queens *County*

as the place of trial.

Summons with Notice

Plaintiff resides in Queens *County.*

To the above named Defendant S*:*

You are hereby Summoned *to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.*

Dated, April 20th, 1964.

FRANK D. O'CONNOR
District *Attorney for* Queens County
Office and Post Office Address
126-05 Hoover Avenue
Kew Gardens, 15
Borough of Queens, City of New York.

Affidavit of Service on Individual(s)

State of New York, County of } *ss.:*

being duly sworn, deposes and says, that on the day of 19 , at No.

he served the within Summons on the Defendant therein named, by delivering to and leaving a true copy of each thereof with said defendant personally; deponent knew the said person so served as aforesaid to be the same person mentioned and described in said summons as the defendant therein; deponent is over the age of 18 years and not a party to the action.

Sworn to before me this day of 19 }

Affidavit of Service on a Corporation

State of New York, County of } *ss.:*

being duly sworn, deposes and says, that on the day of 19 , at No.

he served the within Summons on

a corporation, the defendant therein named, by delivering to and leaving a true copy of each thereof personally with

an officer of said corporation, to wit, its deponent knew said corporation so served as aforesaid to be the same corporation mentioned and described in said summons as the defendant therein, and knew said

to be such officer thereof; deponent is over the age of 18 years and not a party to the action.

Sworn to before me this day of 19 }

Supreme Court of the State of New York

COUNTY OF QUEENS

THE PEOPLE OF THE STATE OF NEW YORK ex rel FRANK D. O'CONNOR, District Attorney, Queens County,

Plaintiff

against

ARNOLD GOLDWAG, et al.,

Defendant S

Summons

To the Defendant :

Notice is hereby given to you that, upon your default to appear, or answer the within summons, judgment will be taken against you for the sum of $..... with interest from the..... day of....., 19....., and with the costs of this action.

FRANK D. O'CONNOR

District *Attorney for* Queens Co.

Office and Post Office Address
126-05 Hoover Avenue
Kew Gardens 15,
Borough of Queens
City of New York.

SUPREME COURT : QUEENS COUNTY

- x

THE PEOPLE OF THE STATE OF NEW YORK ex rel FRANK D. O'CONNOR, District Attorney, Queens County,

Plaintiff,

-against-

ARNOLD GOLDWAG, GEORGE JOHNSON, GEORGE KAUFMAN, ISAIAH BRUNSON, MARSHALL ENGLAND, HERBERT CALLENDER, "JOHN DOE", "RICHARD ROE", "JANE DOE", "MARY ROE", the true names being unknown and the persons intended being the members and the officers and the directors of the Bronx Chapter of the Congress of Racial Equality, Brooklyn Chapter of the Congress of Racial Equality, Manhattan Chapter of the Congress of Racial Equality, Queens Chapter of the Congress of Racial Equality, and C.O.R.E., Bronx Chapter, C.O.R.E., Brooklyn Chapter, C.O.R.E., Manhattan Chapter and C.O.R.E., Queens Chapter and JESSE GRAY and Community Council on Housing and its members, officers and directors,

Defendants.

- x

The People ex rel FRANK D. O'CONNOR, District Attorney, Queens County, appearing pro se, complaining of the defendants, respectfully alleges:

1. He, FRANK D. O'CONNOR now is, and at all times hereinafter mentioned was the District Attorney of Queens County.

2. The defendants herein are respectively ARNOLD GOLDWAG, public relations officer of the Brooklyn Chapter of

of Congress of Racial Equality; GEORGE JOHNSON, office manager of the Manhattan Chapter of the Congress of Racial Equality; GEORGE KAUFMAN, office manager of the Queens Chapter of the Congress of Racial Equality; ISAIAH BRUNSON, Chairman of the Brooklyn Chapter of the Congress of Racial Equality; MARSHALL ENGLAND, Chairman of the Manhattan Chapter of the Congress of Racial Equality; HERBERT CALLENDER, Chairman of the Bronx Chapter of the Congress of Racial Equality; "JOHN DOE", "RICHARD ROE", "JANE DOE", "MARY ROE", the true names being unknown, are persons who are members, officers and directors of the Manhattan, Brooklyn, Bronx and Queens Chapters of the Congress of Racial Equality and JESSE GRAY, Chairman of the Community Council on Housing and all of its members, officers and directors of the Community Council on Housing.

3. On or about and between April 22, 1964 and October 17, 1964, there will be in the County of Queens a World's Fair, to which citizens and residents of the County of Queens, members of the general public and foreign visitors are invited and likely to be present.

4. Upon information and belief, there will be present over the period of the World's Fair located in Flushing Meadows in the County of Queens, State of New York, over seventy million visitors, with an average daily attendance of over four hundred thousand persons.

5. That the means of access to and egress from the aforestated World's Fair are certain highways known and described as Grand Central Parkway, Brooklyn-Queens Expressway,

Belt Parkway, Laurelton Parkway, Cross Island Parkway, Interboro Parkway, Van Wyck Expressway, Whitestone Expressway or any other parkways or expressways or boulevards located in the Borough and County of Queens, City and State of New York, and all tunnels, bridges and other access feeder-ways leading thereto and therefrom.

6. Said public roads, highways and thoroughfares running to and from the aforesaid World's Fair are in general general use by the public as a public road, highway and thoroughfare, and by reason of the premises and by virtue of the statutes of the State of New York in such case made and provided, said public roads, highways and thoroughfares have become, are and will continue to be and at the time of all the acts herein complained of are and will continue to be a public road, highway and thoroughfare.

7. The same have never been vacated in pursuance of law or abandoned by the public as public highways, but on the contrary have been and are in constant use by the public and have been and are maintained at public expense.

8. That the persons who will go, or attempt to go, to the aforesaid New York World's Fair grounds, by automobile or omnibus, will most likely travel on one or more of the said parkways and expressways, boulevards and other public highways in order to enter the said grounds and in order to depart therefrom; that the said public highways have been heavily travelled prior to the opening of the said New York World's Fair and,

subject to regulations, are used by ambulances, Fire Department vehicles, Police Department vehicles, Sanitation vehicles, other emergency vehicles, trucks for transport of food and other necessities vital to the health, safety and welfare of the almost two million residents of this County and of the residents of adjacent counties, as well as by passenger vehicles and omnibuses used for travel to and from school, work, doctors' offices and hospitals in the normal life of the people of a metropolitan community.

9. The infrequent mechanical breakdowns of vehicles on highways of the County of Queens have on many occasions resulted in serious traffic tie-ups and prolonged delays as well as the daily morning and evening rush hour traffic; on many occasions such traffic tie-ups have resulted in accidental collisions of vehicles with accompanying deaths, personal injuries and property damage.

10. Upon information and belief the defendants herein, and each and every one of them, on or about and between April 1, 1964 and April 17, 1964 have decided jointly and severally to agree to have certain cars stalled, stopped and deliberately slowed down on the aforesaid public highways of the County of Queens, City and State of New York on April 22, 1964 and thereafter.

11. Upon information and belief, the defendants above named and each and every one of them, on or about and between April 1, 1964 and until the present date, did and continue to, order, instruct, advise, suggest and urge others, as well as each and every one of them, to stall, stop and deliberately slow down certain motor vehicles on the aforesaid public highways of the County of Queens, City and State of New York.

12. The defendants have been requested to cease and desist their threatened actions and their followers' threatened actions herein and the continuation thereof. The defendants have continuously refused to curtail, cease and desist their and his and her activities and continue to direct, order, suggest and urge the actions hereinabove set forth, despite requests to do so by public officials and members of the general public.

13. Upon information and belief the necessary effect of such action heretofore mentioned will prevent, deter and bar, impede and curtail, destroy and injure the proper use of these public highways and facilities by public and private agents and public and private individuals; that the public health and safety will be impeded, injured and prevented by the actions of the defendants and each and every one of them, in that the Police Department, Fire Department, Sanitation Department and Health Department and the various hospitals servicing the communities of Queens will be impeded and prevented from arriving at scenes of emergency, danger and need, to minister their respective duties of prevention, protection and care, causing in turn serious damages and injuries and probable loss of life. These acts of the defendants are a danger to human life, detrimental to public health and an occasion of great public damage.

14. That those in danger will have no adequate protection or remedy at law, either civil or criminal, and that the irreparable harm and injuries and possible loss of life will already be caused and suffered.

WHEREFORE the plaintiff prays that the said ARNOLD GOLDWAG, GEORGE JOHNSON, GEORGE KAUFMAN, ISAIAH BRUNSON, MARSHALL ENGLAND, HERBERT CALLENDER, "JOHN DOE", "RICHARD ROE", "JANE DOE", "MARY ROE", the true names being unknown and the persons intended being the members and the officers and the directors of the Bronx Chapter of the Congress of Racial Equality, Brooklyn Chapter of the Congress of Racial Equality, Manhattan Chapter of the Congress of Racial Equality, Queens Chapter of the Congress of Racial Equality, and C.O.R.E., Bronx Chapter, C.O.R.E., Brooklyn Chapter, C.O.R.E., Manhattan Chapter and C.O.R.E., Queens Chapter and JESSE GRAY and Community Council on Housing and its members, officers and directors and their, his, her and its agents, servants and employees be perpetually enjoined from obstructing the said public highways, conduits, feed-ways and other access routes heretofore described in the said County of Queens in the State of New York and that the said ARNOLD GOLDWAG, GEORGE JOHNSON, GEORGE KAUFMAN, ISAIAH BRUNSON, MARSHALL ENGLAND, HERBERT CALLENDER, "JOHN DOE", "RICHARD ROE", "JANE DOE", "MARY ROE", the true names being unknown and the persons intended being the members and the officers and directors of the Bronx Chapter of the Congress of Racial Equality, Brooklyn Chapter of the Congress of Racial Equality, Manhattan Chapter of the Congress of Racial Equality, Queens Chapter of the Congress of Racial Equality, and C.O.R.E., Bronx Chapter, C.O.R.E., Brooklyn Chapter, C.O.R.E., Manhattan Chapter and C.O.R.E., Queens Chapter and JESSE GRAY and Community Council of Housing and its members, officers and directors may be required by the order and injunction of this

Court to desist and refrain from further participation either by instruction, direction, suggestion and action, direct or indirect, in the planned obstruction of the aforesaid highways and byways of Queens County in any manner whatsoever, and the plaintiff may have such other and further relief as may be just and equitable.

FRANK D. O'CONNOR
District Attorney
of Queens County
125-01 Hoover Avenue
Kew Gardens 35, N.Y.

STATE OF NEW YORK)
CITY OF NEW YORK) ss:
COUNTY OF QUEENS)

FRANK D. O'CONNOR, being duly sworn, deposes and says that he is the plaintiff in the foregoing proceeding; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me this
20 day of April, 1964.

Frank D. O'Connor

Harvey B. Ehrlich

HARVEY B. EHRLICH
Notary Public, State of New York
No. 41-6158975, Queens County
Term Expires March 30, 1966

SUPREME COURT : QUEENS COUNTY

- x

THE PEOPLE OF THE STATE OF NEW YORK ex rel FRANK D. O'CONNOR, District Attorney, Queens County,

Plaintiff,

-against-

ARNOLD GOLDWAG, GEORGE JOHNSON, GEORGE KAUFMAN, ISAIAH BRUNSON, MARSHALL ENGLAND, HERBERT CALLENDER, "JOHN DOE", "RICHARD ROE", "JANE DOE", "MARY ROE", the true names being unknown and the persons intended being the members and the officers and the directors of the Bronx Chapter of the Congress of Racial Equality, Brooklyn Chapter of the Congress of Racial Equality, Manhattan Chapter of the Congress of Racial Equality, Queens Chapter of the Congress of Racial Equality, and C.O.R.E., Bronx Chapter, C.O.R.E., Brooklyn Chapter, C.O.R.E., Manhattan Chapter and C.O.R.E., Queens Chapter and JESSE GRAY and Community Council on Housing and its members, officers and directors,

Defendants.

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P R E S E N T :

HON. JOSEPH M. CONROY,

JUSTICE.

Upon reading and filing the annexed affidavit of FRANK D. O'CONNOR, District Attorney, Queens County, duly sworn to the 20th day of APRIL, 1964, and a copy of the summons and complaint in this action, duly verified by the plaintiff on the 20th day of APRIL, 1964, and the photocopy of an advertising piece and on the photocopies of newspaper articles which are

hereto annexed as exhibits,

LET the defendants, ARNOLD GOLDWAG, GEORGE JOHNSON, GEORGE KAUFMAN, ISAIAH BRUNSON, MARSHALL ENGLAND, HERBERT CALLENDER, "JOHN DOE", "RICHARD ROE", "JANE DOE", "MARY ROE", the true names being unknown and the persons intended being the members and the officers and the directors of the Bronx Chapter of the Congress of Racial Equality, Brooklyn Chapter of the Congress of Racial Equality, Manhattan Chapter of the Congress of Racial Equality, Queens Chapter of the Congress of Racial Equality and C.O.R.E., Bronx Chapter, C.O.R.E., Brooklyn Chapter, C.O.R.E., Manhattan Chapter and C.O.R.E., Queens Chapter and JESSE GRAY and Community Council on Housing and its members, officers and directors, SHOW CAUSE before one of the Justice's of this Court, at a Special Term Part I of this Court, held in and for the County of Queens, at the General Courthouse, 88-11 Sutphin Boulevard, Jamaica, in the Borough of Queens, City of New York, on the 23rd day of APRIL, 1964 at 9:30 O'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein restraining and enjoining the defendants, herein above named pending the determination of the issues in this action from driving or operating an automobile or other motor vehicle on or along the public highways of the County of Queens, known and described as Grand Central Parkway, Brooklyn-Queens Expressway, Belt Parkway, Laurelton Parkway, Cross Island Parkway, Interboro Parkway, Van Wyck Expressway, Long Island Expressway, Whitestone Expressway or any other parkways or expressways or boulevards located in the Borough and County of Queens, City and State of New York, Williamsburg Bridge, the Manhattan Bridge, Brooklyn Bridge, Queensborough

Bridge, Triborough Bridge, Bronx-Whitestone Bridge, Throgs Neck Bridge, the Brooklyn-Queens Tunnel, the Queens-Midtown Tunnel, or in or on any service roads, approaches, entry roads or exit roads, ingress roads or egress roads, alongside of, adjacent to, or leading to or leading from any of the said public highways, bridges and tunnels with insufficient gasoline in the gasoline tanks thereof, or with insufficient water in the radiators thereof to enable such vehicles to be driven along and away from the said parkways, expressways or boulevards, bridges and tunnels, or by any other means disabling or causing the disability of such vehicles from being driven along and away from the said public highways, or stalling a motor vehicle on or along the said public highways or access roads thereto, or permitting a motor vehicle to remain standing on or along the said public highways or access roads thereto, or abandoning a motor vehicle on or along said public highways or access roads thereto, or making a repair to a motor vehicle on or along said public highways, or failing to observe or failing to obey traffic regulations, traffic lights or traffic direction by a police officer of the City of New York or of the New York World's Fair Corporation on or along the said public highways or access roads thereto, or failing to observe or failing to obey regulations of the Traffic Department or of the Police Department of the City of New York, or to travel at unreasonably slow speeds on or along the said public highways, bridges and tunnels at any time on or during Wednesday, April 22nd, 1964, or on and during any other day during the period of operation of the New York World's Fair commencing with April 22nd, 1964 and terminating October 17, 1964, and from conspiring, inducing or advising each other or

the members of any of the Chapters of the Congress of Racial Equality or the Community Council on Housing, herein named, or any other person or persons to drive or operate any motor vehicle along any portion of the said public highways, bridges, tunnels or access roads thereto, with insufficient gasoline in the gasoline tanks thereof, or with insufficient water in the radiators thereof to enable such vehicles to be driven along and away from the said parkways, expressways or boulevards, bridges and tunnels, or by any other means disabling or causing the disability of such vehicles from being driven along and away from the said public highways or stalling a motor vehicle on or along the said public highways or access roads thereto, or permitting a motor vehicle to remain standing on or along the said public highways or access roads thereto, or abandoning a motor vehicle on or along said public highways or access roads thereto, or making a repair to a motor vehicle on or along said public highways, or failing to observe or failing to obey traffic regulations, traffic lights or traffic direction by a police officer of the City of New York or of the New York World's Fair Corporation on or along the said public highways or access roads thereto, or failing to observe or failing to obey regulations of the Traffic Department or of the Police Department of the City of New York, or to travel at unreasonably slow speeds on or along the said public highways, bridges and tunnels at any time on or during Wednesday, April 22nd, 1964, or on and during any other day during the period of operation of the New York World's Fair commencing with April 22nd, 1964 and terminating October 17th, 1964, and it is

ORDERED, that in the meantime, and until the determination of the motion brought on by this order to SHOW CAUSE, and the entry of an order thereon, the defendants, ARNOLD GOLDWAG, GEORGE JOHNSON, GEORGE KAUFMAN, ISAIAH BRUNSON, MARSHALL ENGLAND, HERBERT CALLENDER, "JOHN DOE", "RICHARD ROE", "JANE DOE", "MARY ROE", the true names being unknown and the persons intended being the members and the officers and the directors of the Bronx Chapter of the Congress of Racial Equality, Brooklyn Chapter of the Congress of Racial Equality, Manhattan Chapter of the Congress of Racial Equality, Queens Chapter of the Congress of Racial Equality, and C.O.R.E., Bronx Chapter, C.O.R.E, Brooklyn Chapter, C.O.R.E. Manhattan Chapter and C.O.R.E., Queens Chapter and JESSE GRAY and Community Council on Housing and its members, officers and directors, be and each of them is hereby stayed enjoined and restrained from driving or operating an automobile or other motor vehicle on or along the public highways of the County of Queens, known and described as Grand Central Parkway, Brooklyn-Queens Expressway, Belt Parkway, Laurelton Parkway, Long Island Expressway, Cross Island Parkway, Interboro Parkway, Van Wyck Expressway, Whitestone Expressway or any other parkways or expressways or boulevards located in the Borough and County of Queens, City and State of New York, Williamsburg Bridge, the Manhattan Bridge, Brooklyn Bridge, Queensborough Bridge, Triborough Bridge, Bronx-Whitestone Bridge, Throgs Neck Bridge, the Brooklyn-Queens Tunnel The Queens-Midtown Tunnel, or in or on any service roads, approaches, entry roads or exit roads, ingress roads or egress roads, alongside or, adjacent to, or leading to or leading from any of the said public highways, bridges and tunnels with insufficient gasoline in the gasoline tanks thereof, or with

insufficient water in the radiators thereof to enable such vehicles to be driven along and away from the said parkways, expressways or boulevards, bridges and tunnels, or by any other means disabling or causing the disability of such vehicles from being driven along and away from the said public highways, or stalling a motor vehicle on or along the said public highways or access roads thereto, or permitting a motor vehicle to remain standing on or along the said public highways or access roads thereto, or abandoning a motor vehicle on or along said public highways or access roads thereto, or making a repair to a motor vehicle on or along said public highways, or failing to observe or failing to obey traffic regulations, traffic lights or traffic direction by a police officer of the City of New York or of the New York World's Fair Corporation on or along the said public highways or access roads thereto, or failing to observe or failing to obey regulations of the Traffic Department or of the Police Department of the City of New York, or to travel at unreasonably slow speeds on or along the said public highways, bridges and tunnels at any time on or during Wednesday, April 22nd, 1964, or on and during any other day during the period of operation of the New York World's Fair commencing with April 22nd, 1964 and terminating October 17, 1964, and from conspiring, inducing or advising each other or the members of any of the Chapters of the Congress of Racial Equality or of the Community Council on Housing herein named, or any other person or persons to drive or operate any motor vehicle along any portion of the said public highways, bridges, tunnels or access roads thereto, with insufficient gasoline in the gasoline tanks thereof, or with insufficient water in the radiators

thereof to enable such vehicles to be driven along and away from the said parkways, expressways or boulevards, bridges and tunnels, or by any other means disabling or causing the disability of such vehicles from being driven along and away from the said public highways or stalling a motor vehicle on or along the said public highways or access roads thereto, or permitting a motor vehicle to remain standing on or along the said public highways or access roads thereto, or abandoning a motor vehicle on or along said public highways or access roads thereto, or making a repair to a motor vehicle on or along said public highways, or failing to observe or failing to obey traffic regulations, traffic lights or traffic direction by a police officer of the City of New York or of the New York World's Fair Corporation on or along the said public highways or access roads thereto, or failing to observe or failing to obey regulations of the Traffic Department or of the Police Department of the City of New York, or to travel at unreasonably slow speeds on or along the said public highways, bridges and tunnels at any time on or during Wednesday, April 22nd, 1964, or on and during any other day during the period of operation of the New York World's Fair commencing with April 22nd, 1964 and terminating October 17th, 1964.

Sufficient cause appearing therefor, let service of a copy of this order and the papers upon which it is based upon the defendants hereinabove named or any of them, on or

before the 21st day of April, 1964, be deemed good and sufficient service thereof.

Signed this 20th day of April, 1964, Queens, New York.

E N T E R

Joseph M. Conroy
Justice, Supreme Court
Queens County

FRANK D. O'CONNOR
District Attorney
Queens County
126-05 Hoover Avenue
Kew Gardens 15, New York

SUPREME COURT : QUEENS COUNTY

- -x

THE PEOPLE OF THE STATE OF NEW YORK ex rel FRANK D. O'CONNOR, District Attorney, Queens County,

Plaintiff,

- against -

ARNOLD GOLDWAG, GEORGE JOHNSON, GEORGE KAUFMAN, ISAIAH BRUNSON, MARSHALL ENGLAND, HERBERT CALLENDER, "JOHN DOE", "RICHARD ROE", "JANE DOE", "MARY ROE", the true names being unknown and the persons intended being the members and the officers and the directors of the Bronx Chapter of the Congress of Racial Equality, Brooklyn Chapter of the Congress of Racial Equality, Manhattan Chapter of the Congress of Racial Equality, Queens Chapter of the Congress of Racial Equality, and C.O.R.E., Bronx Chapter, C.O.R.E., Brooklyn Chapter, C.O.R.E., Manhattan Chapter and C.O.R.E., Queens Chapter and JESSE GRAY and Community Council on Housing and its members, officers and directors,

Defendants.

- -x

State of New York)
: ss.:
County of Queens)

FRANK D. O'CONNOR, being duly sworn, deposes and says:

1. That he is the District Attorney of the County of Queens, having been duly elected to such public office by the people of the County of Queens at the general election in November, 1963 and that he is now serving as such public officer.

2. That he makes this affidavit in support of his application for an order directing the above named defendants to show cause why an injunction and a restraining order should not be granted restraining and enjoining them from perpetrating a "stall-in" on the public highways of the County of Queens as hereinafter set forth.

3. That an action for a permanent injunction will be commenced by the service of a summons and complaint on the defendants simultaneously with the service of the order to show cause.

4. That the New York World's Fair of 1964 is scheduled to open on April 22, 1964, in the early morning of that day, in an area located in the north central portion of the County of Queens; that the World's Fair authorities estimate and it is reasonable to believe that more than seventy million people will visit the Fair grounds during a twelve month period; that it is probable that many hundreds of thousands of persons will attempt to visit the Fair on April 22, 1964, the opening day thereof; that several thousands of persons will be employed daily at the Fair grounds for a six month period commencing with April 22, 1964 and for a second six month period commencing April, 1965; that the Grand Central Parkway, Brooklyn-Queens Expressway, Belt Parkway, Laurelton Parkway, Cross Island Parkway, Interboro Parkway, Van Wyck Expressway, Whitestone Expressway or any other parkways or expressways or boulevards located in the Borough and County of Queens, City and State of New York, or in or on any

service roads, approaches, entry roads or exit roads, ingress roads or egress roads, alongside of, adjacent too, or leading to or leading from any of the said highways are public highways in the County of Queens; that the bridges and tunnels connecting the counties of Kings and Queens with other counties lead to the said public highways in the County of Queens; that persons who will go, or attempt to go, to the New York World's Fair grounds by automobile or omnibus will most likely travel on one or more of the said parkways and expressways named and on the boulevards located in the County of Queens in order to enter the said grounds and in order to depart therefrom; that the said public highways have been heavily travelled prior to the opening of the said World's Fair and, subject to regulations, are used by ambulances, Fire Department vehicles, Police Department vehicles, Sanitation vehicles, other emergency vehicles, trucks for transport of food and other necessities vital to the health, safety and welfare of the almost two million residents of this County and of the residents of adjacent counties, as well as by passenger vehicles and omnibuses used for travel to and from school, work, doctors' offices and hospitals in the normal life of the people of a metropolitan community; that the infrequent mechanical breakdowns of vehicles on highways of this County have on many occasions resulted in serious traffic tie-ups and prolonged delays that the daily morning and evening rush-hour traffic have also caused frequent traffic tie-ups and delays; that on many occasions such traffic tie-ups have resulted in accidental collisions of vehicles with accompanying property damage and, often, personal injuries and deaths.

5. As alleged in the complaint herein on information and belief, the named defendants, as individuals and as officials of the Bronx, Brooklyn, Manhattan and Queens Chapters of the Congress of Racial Equality, and/or the Community Council on Housing have conspired with each other and have planned to have members of their organizations and others effect a blockage and obstruction of traffic on the parkways, expressways and other public highways of Queens County on the opening day of the New York World's Fair, Wednesday, April 22, 1964 and have further conspired with each other to induce, advise and solicit the members of other Chapters and others to obstruct the said public highways and roads and have caused the distribution of leaflets, throw-aways and advertising material to their members and others to cause such traffic obstruction and have urged their members and others to "drive a while" to "take only enough gas to get your car on one of these highways, Grand Central Parkway, Brooklyn-Queens Expressway, Belt Parkway, Interboro Parkway, Van-wyck Expressway"; and that the named defendants and members of their chapters and others have reconnoitered the roadways and intersections in this County to be affected and have worked out schedules for the "stall-in" to the "minutest detail."

6. That the facts stated in the complaint herein, on information and belief, as to the threats to the peace, health, safety and welfare of the residents of this County are true as deponent is informed by an advertising piece, a copy of which is annexed hereto as an exhibit; the newspapers published in

the County of Queens and in the City of New York, copies of some of which are annexed hereto as exhibits; statements by the defendants or some of them, broadcast over television and radio stations, in newspapers and by investigations conducted by members of my staff.

7. That the truth of the facts stated in the complaint herein, on information and belief, and the seriousness and danger of the threats and plans concocted by the named defendants are confirmed by the statement made by the national leaders of the major civil rights organizations, as reported in the copy of newspaper articles annexed hereto; that the "stall-in would be neither orderly nor non-violent and that it would harass the public and "threaten possible indiscriminate harm to thousand

8. That your deponent verily believes that if the restraining order herein requested and a temporary injunction be not granted and if the "stall-in" be not prevented, that it will indeed cause and occasion "possible indiscriminate harm to thousands"; that the health, safety and welfare of almost two million residents of this County and the hundreds of thousands of visitors to this County will be seriously endangered; that ambulance, fire and police and emergency vehicles will not be enabled to reach their destinations timely when required, with probable resultant loss of life, personal injury and property damage; that vehicular collision may occur on the said public highways with probable similar loss of life or limb or property damage.

9. That a temporary restraining order is hereby requested on the ground that the "stall-in" by the named defendants and the members of their Chapters on April 22, 1964 or on any other days prior to the hearing of this motion will cause and result in immediate and irreparable injury, loss or damage, and possible loss of life unless the defendants named specifically and generally as members, officers and directors of the named Chapters of the Congress of Racial Equality and the Community Council on Housing, whose true names are now unknown, are restrained until the hearing herein be had.

10. That the plaintiff has demanded and submits that he is entitled to a judgment restraining the defendants, named specifically and as a class, from the commission of the acts herein set forth and it is further submitted that the people of this County and the plaintiff as District Attorney of Queens County and individually would be irreparably injured if such acts or any of them would be committed during the pendency of this action.

11. That neither the restraining order nor the temporary injunction nor the injunction demanded in the complaint will deny to the defendants or any of them the right to petition or the right to peacefully picket for the redress of their grievances.

12. That those in danger, the residents in and the visitors to the County of Queens will have no adequate protection or remedy at law, either civil or criminal and that

the immediate and irreparable harm and injuries and possible loss of life will already be caused and suffered.

WHEREFORE deponent respectfully requests an order directing the defendants to show cause why a temporary injunction should not be granted herein and further requests that a restraining order be granted pending the determination of this proceeding.

Frank D. O'Connor

Sworn to before me this
20 day of April, 1964.

Harvey B. Ehrlich

HARVEY B. EHRLICH
Notary Public, State of New York
No. 41-6158975, Queens County
Term Expires March 30, 1966

Stall-In Plan Still On: CORE

By CYRIL EGAN JR.

Unmoved by a three-hour meeting with members of the City Commission on Human Rights, leaders of three militant Congress of Racial Equality chapters went ahead today with plans for a massive auto stall-in near the World's Fair on its opening day next Wednesday.

"The World's Fair stall-in is still on as of this moment," declared Isiah Brunson, chairman of Brooklyn CORE, after the closed meeting last night.

Both Mr. Brunson and Madison Jones, executive director of CCHR, said some progress had been made in "establishing communication" between the stall-in group and the commission, but Mr. Brunson said no agreement was reached on when another meeting would be held.

HOLD TO DEMANDS

He expressed the hope another session would take place today, adding:

"If our demands are met, the demonstration will be called off. But preparations for the stall-in will continue unless the demands are satisfied.

"If we don't hear the Mayor by Monday night, we'll go ahead with our plans. The ghetto CORE chapters—Bronx, Brooklyn and Manhattan—will meet with their memberships at 8 p.m. Monday for final instructions and assignments."

PLEDGE BY MAYOR

Mr. Jones said last night's meeting was held without prior consultation with Mayor Wagner, who earlier in the day denounced the projected demonstration as most unfortunate and ill-chosen, as well as illegal."

Mr. Wagner promised that the police "will see to it the laws are obeyed and the interests of public safety are adequately protected by whatever means needed."

Asked whether the commission's talks would be the city's only effort to head off the stall-in, Mr. Jones said he knew of no other plans by city officials to talk to CORE.

Explaining Mr. Jones' unilateral action in calling the meeting, a CCHR spokesman said:

"It's just like the fire department. When there's a fire, the firemen know that it's their duty to go out, without asking for approval."

Mr. Brunson reiterated that the dissident CORE chapters, under fire by the national CORE leadership as well as other civil rights groups opposing the stall-in, still refused to back down on their demands relating to desegregation of junior high schools, rent strikes, closing city construction sites where unions practice alleged discrimination, and creation of a public review board to probe police brutality charges.

PLAN CONDEMNED

In Washington, Negro leaders of the nation's top civil rights groups branded the stall-in as "revolutionary proposal" that might harm thousands of persons and fail to serve "the broad interests and needs of the Negro people."

President Johnson was asked how he felt about the use of civil disobedience as a tactic, and replied:

"You do the civil rights cause no good when you go to this extent."

A Police Department tow-away operation already has been programmed to cope with the stall-in calling for hundreds of cars to run out of gas on major arteries leading to the Fair grounds in an attempt to create a mass traffic tieup.

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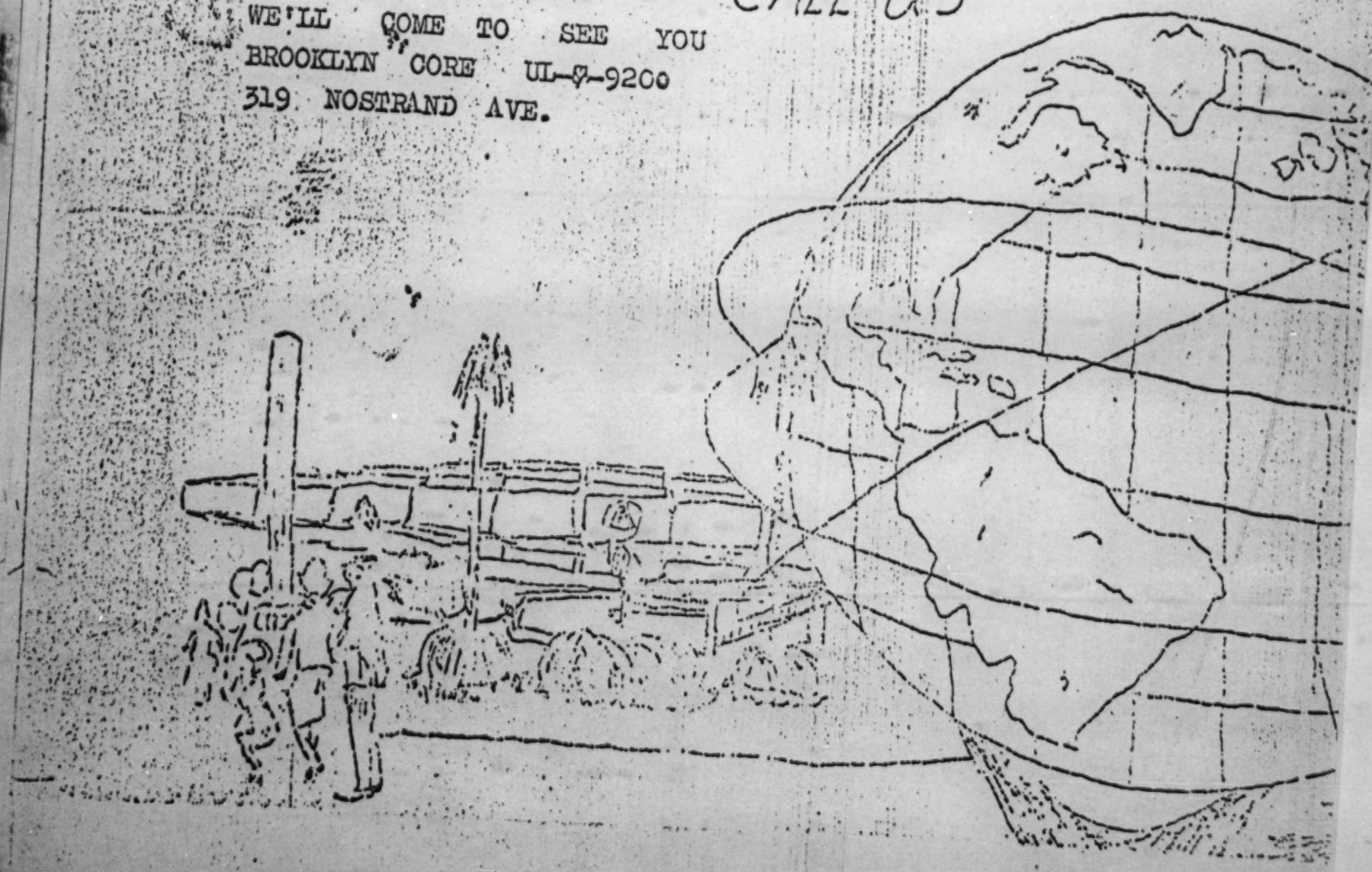

THE NEW YORK TIMES, SATURDAY, APRIL [illegible], 1964.

MURPHY ALERTS POLICE FOR FAIR

Emergency Duty Ordered to Cope With Stall-In Threat and Opening Events

By THEODORE M. JONES

The Police Department set up emergency duty schedules yesterday to cope with the threatened traffic tie-up by three militant civil rights groups and to provide maximum protection for President Johnson on the opening day of the World's Fair.

Police Commissioner Michael J. Murphy, in announcing the "limited emergency" work schedule, said he had ordered extra policemen to work Wednesday, the opening day.

The emergency schedule will affect undisclosed numbers of the 25,000-man force and will put them on a 12-hour day. That will extend the usual tour of duty by four hours.

Mr. Murphy's statement was made as leaders of the Brooklyn, New York and Bronx chapters of the Congress of Racial Equality were asserting that at least 1,800 automobiles would be used to disrupt traffic on the major arteries near the fair.

Herbert Callender, chairman of Bronx CORE, told a crowded news conference that the 1,800 autos "had been pledged for use in the stall-in" and that 1,000 more were expected by Tuesday night. The traffic demonstration is scheduled to start at 7 A.M. Wednesday.

Mr. Callender, along with Isiah Brunson, head of Brooklyn CORE, and Marshall C. England, the New York chairman, reaffirmed their determination to go through with the plan to stall autos by running out of gasoline on the major highways near the fair.

The three leaders declared that only action by city officials on their civil rights grievances could prevent the demonstration.

"It's now up to the city to prevent the stall-in," Mr. England declared. "We don't want to use this tactic, but the city should begin to implement our demands and consider our grievances."

Meanwhile, the national

Continued on Page 16, Column 2

Police Put on Emergency Duty To Prepare for Opening of Fair

Continued From Page 1, Col. 2

CORE office, which suspended its Brooklyn chapter for refusing to cancel the stall-in, found itself beset with problems on its planned demonstration inside the World's Fair on opening day.

The civil rights group, which has announced that it will picket 12 pavilions at the fair, said fair officials had refused a request to meet with its leaders to discuss the planned picketing.

A CORE spokesman said the leaders felt "it was imperative to have some dialogue with the fair officials prior to Wednesday's direct action."

It was learned that CORE was concerned about the possibility of violence between the pickets and the Pinkerton police force at the fair, and that the civil rights leaders were anxious to set up a plan of procedure with the fair officials.

It was disclosed that for the last week small groups of CORE members from several chapters had been making night reconnaissance of the fair grounds to measure distances around the pavilions and to plot demonstration areas and plan tactics.

The emergency action taken by the Police Department was disclosed by Commissioner Murphy at a news conference after a ceremony at headquarters at which he appointed 444 men and women to the force.

The new probationary patrolmen will begin immediate training at the Police Academy and will be used in nonenforcement capacities on Wednesday to help fill the need for extra manpower.

Unusual Procedure

Mr. Murphy told the new appointees that it was unusual to put probationary policemen to work so fast. He explained also that it was rare that the need for an emergency work schedule followed so closely the appointment of new men to the force.

Stressing that law enforcement was one of the most difficult tasks of government, the Commissioner declared that the appointees "must render this service without abridging fundamental human rights or jeopardizing civil liberties."

Human rights also was the main topic at the news conference held by the leaders of the threatened traffic tie-up at the New York CORE headquarters in the Theresa Hotel at Seventh Avenue and 125th Street.

Mr. Callender, who served as spokesman, declared that Negroes were getting "frustrated to such a point that forms of action have been suggested, even bullets."

He expressed fear that violence might erupt in the summer if protests such as the "stall-in" did not win the rights demanded by Negroes.

Mr. Callendar and the two other leaders demanded that Mayor Wagner take "immediate action" with regard to police brutality, slum housing, school integration and discrimination in employment.

Only with that action, Mr. Brunson declared, can the city avert the "stall-in."

Traffic Tactics Detailed

During the news conference, the strategists of the planned traffic jam distributed a new leaflet that not only called on the participants "to run out of gas," but urged them to initiate a slowdown by such means as "stop and check your engine" and "fix your flat tire."

Meanwhile, two new groups joined those denouncing the planned traffic demonstration. The civil rights committee of the City Central Labor Council called the plan "a hare-brained scheme," and declared that the tie-up would hurt the cause it was designed to advance.

The East River chapter of CORE asserted that the tactic could only serve "to confuse the issue and play into the hands of the enemies of freedom."

The chapter, which caused a traffic jam by its sitdown on the Triborough Bridge on March 7, declared that a "stall-in" near the World's Fair "provided no direct confrontation between the supporters of integration and the defenders of the status quo."

However, the traffic plan did get a boost from John Lewis, chairman of the Student Nonviolent Coordinating Committee. He declared in Washington yesterday that the move would "not only dramatize the desperate plight of the Negro in New York but throughout the nation."

Mr. Lewis had been one of the major civil rights leaders who had signed a statement denouncing the plan. He said yesterday that action had been "hasty" and was "not consistent" with his group's policy.

~~Hanley~~

Mr. Rachlin

5, OAK ROAD,
WITHINGTON,
MANCHESTER 20,
ENGLAND.
15. XII. 64

JAN 21 1965

Dear Sirs,

I am writing to you on behalf of the Manchester University Amnesty Groups. We are concerned over the case of Arnold Goldwag who was sentenced to one years imprisonment in April 1964, for taking part in a Human Rights Demonstration.

We have very little information about this man, but would like to do all we can to help him. Can you please give us any information about him, that you feel might be relevant?

Yours faithfully,

Lesley S. Hunter

(over)

Conrad Lynn Esq.

Dear Connie

Please advise
re Arnold
Goldwag's case.
How are things going

Sincerely
CR

February 9, 1965

Conrad J. Lynn, Esq.
401 Broadway
New York, N.Y.

Dear Connie:

Please advise me of the Arnold Goldwag case.

How are things going?

Sincerely,

CR:jp

Carl Rachlin
General Counsel

Dear Connie
Everything
here and Sincerely
Carl

4/8

March 25, 1965

Conrad J. Lynn, Esq.
401 Broadway
New York, N.Y.

Dear Connie:

Anything new on Arnie's case?

Regards,

Carl Rachlin
General Counsel

CR:hd1

March 29, 1966

Honorable Harry D. Gideonse
President, Brooklyn College
Bedford Avenue & Avenue "H"
Brooklyn 10, New York

Dear Mr. President:

Once more I write to you concerning Arnold Goldwag about whom you and I have recently corresponded (see my letter dated February 1, 1966). Important information has developed which I think, in light of your thoughts in your recent letter, now make it possible to permit him to return to Brooklyn College.

It is my understanding that there are two matters pending against him as a result of various civil rights activities engaged in by Goldwag which might have been of concern to you. One is the contempt of court charge pending against him and the second was the charge concerning a demonstration at the Board of Education. Within recent weeks both of these matters have been dismissed. During February the Appelate Court reversed the contempt of court charge against Goldwag and very recently the charge for the demonstration at the Board of Education was dismissed without a trial.

I previously wrote to you that for many months now he has had a stable employment situation. As of this day there is no change and his employment is with the same employer and his status there is a good one. I am certain that his employer will attest to his way of conducting himself at his employment.

I am very anxious to resolve this matter and I trust that Brooklyn College will be willing to accept him back as a student at the present time. I see no obstacle to readmission and I do see a man anxious to go back to complete his studies and who has demonstrated his stability by a good employment record. I, therefore, respectfully request that steps be taken to readmit him to Brooklyn College.

Sincerely,

CR:tp

Carl Rachlin
General Counsel

LYNN, SPITZ & CONDON

CONRAD J. LYNN
GEORGE R. SPITZ
GENE ANN CONDON

401 BROADWAY
NEW YORK, N. Y. 10013
CA 6-5226

APR 3 1965

April 2, 1965

Carl Rachlin Esq.
CORE
38 Park Row
New York 38

Re: Appeal of Arnold Goldwag

Dear Carl:

The above appeal in the appellate term of the Supreme Court, 1st department, has been withdrawn by stipulation without prejudice to a renewal pending the determination of prior appeals whose results would fix the law for this appeal. I am sure you are familiar with the test cases on appeal in which decisions are now pending.

CJL:eg

Yours truly,

Conrad J. Lynn

Dear Conrad
Thank you for the
letter Thursday
Regards
Ibe pleased to see

Goldwag

BROOKLYN COLLEGE
OF
THE CITY UNIVERSITY OF NEW YORK
Bedford Avenue and Avenue H
BROOKLYN, NEW YORK 11210

OFFICE OF THE DEAN OF STUDENTS

April 21, 1966

Mr. Carl Rachlin
General Counsel
Core Scholarship, Education
and Defense Fund, Inc.
150 Nassau Street
New York, New York 10038

Dear Mr. Rachlin:

President Harry D. Gideonse has kindly referred your letter of March 29, 1966 regarding Mr. Arnold Goldwag to my attention. I am sorry for the delay in responding, but a traditional spring recess intervened.

I am happy to get the information which you provide regarding Mr. Goldwag. Actually, as I recall the contents of President Gideonse's letter on the subject, Mr. Goldwag himself should feel free to ask for fresh consideration, especially in the light of the information which you provide in your letter.

I suggest that Mr. Goldwag make an appointment with Professor Samuel Pearlman, Administrator of Student Services in the School of General Studies, for the purpose of reviewing Mr. Goldwag's eligibility.

Thank you for your interest.

Sincerely yours,

Herbert Stroup
Dean of Students

HS/sg

June 28, 1966

President Harry Gideonse
Brooklyn College
Bedford Avenue & Avenue H
Brooklyn, New York

Re: Arnold Goldwag

Dear President Gideonse:

When I spoke to you a few weeks ago you indicated that you would have someone get in touch with me concerning Mr. Goldwag's desire to return to Brooklyn College for the Fall semester. He has been trying to learn what decision, if any, has been made. At first he spoke, on several occasions, to a Dr. Pearlman on the suggestion of Dean Stroub. But the matter does not seem to get resolved. On the last occasion that he spoke to Dr. Pearlman he was advised that the matter was now in Dean Stroub's hands.

In all candor, I believe Goldwag is being treated unfairly and I request that you use your good officers to straigthen this problem out. As I indicated in previous correspondence and on the phone, I have been advised that Goldwag's legal problems have been cleared up to the best of my knowledge. He has been working steadily now for over a year. I am anxious to know what the decision of Brooklyn College is in this regard since it is my understanding that he is so desirous of returning to school and completing his education that if he is turned down by Dean Stroub, it is his intention to appeal to you, and if necessary, the Board of Higher Education. I trust, and I am sure you do too, that this will not be necessary.

May I respectfully request that this matter be decided promptly and that either he or I be advised of his readmission to Brooklyn College.

Thank you for your courtesy.

Sincerely,

Carl Rachlin
General Counsel

CR/tp

New York Herald Tribune Friday, April 17, 1964

TOP NEGRO GROUPS ON STALL-IN—NO!

But CORE's Rebels Here Rebuft City; Plan Still On

By Fred C. Shapiro
Of The Herald Tribune Staff

The leaders of the nation's six largest Negro organizations yesterday denounced the stall-in plan proposed by Brooklyn Chapter of the Congress of Racial Equality.

Their statement, issued in Washington, came as staff members of the City Commission on Human Rights were being kept waiting more than four hours to begin a conference aimed at averting the proposed stall-in. The meeting, when it was held, ended in failure.

In Washington, Whitney Young, director of the National Urban League, read the joint statement denouncing stall-ins as contrary to the "broad interests and needs of the Negro people." He spoke before the convention of the American Society of Newspaper Editors.

Attorney General Robert F. Kennedy, in a speech preceding the statement of the Negro leaders, fully endorsed a warning Wednesday by State civil rights leaders that passage of the proposal in the upper house would be seriously hampered by violent demonstrations.

In addition to Mr. Young, others signing the statement were CORE director James Farmer; chairman John Lewis of the Student Nonviolent Coordinating Committee; NAACP Director Roy Wilkins, A. Philip Randolph, president of the Sleeping Car Porters Union, and Dorothy Height, of the National Council of Negro Women.

WHAT MAYOR SAID

Mayor Wagner also took time yesterday to join the chorus of denunciation. The plan to tie up traffic by stalling cars near the World's Fair on opening day next Wednesday, he said, was "most unfortunate and ill-chosen, as well as illegal.

"The leaders of this Brooklyn group are assuming a heavy responsibility in deciding that they have the right, in order to advance what they believe in, to deny access to all the people of New York, not only to the World's Fair, but to their homes, work places, hospitals and other such essential facilities."

Even as the Mayor's statement was issued, Madison S. Jones, executive director of the Commission on Human Rights, was waiting patiently in his office at 80 Lafayette St. to meet with Isaiah Brunson, chairman of Brooklyn CORE.

The Brooklyn chapter leaders, who were suspended

More on A STALL-IN—NO!—P 12

Point of No Return Is Near For First-Day Stall-In at Fair

By JOHN L. MILLER
Of the World-Telegram Staff

Monday at 8 p.m. will be the point of no return in the planned civil rights stall-in set for opening day of the World's Fair.

At that hour general membership meetings are scheduled at the headquarters of the Manhattan, Brooklyn, and Bronx chapters of the Congress of Racial Equality.

If the plan is to be shelved, local CORE leaders said today they must have a "guarantee" from Mayor Robert F. Wagner that he will issue an "executive order to implement" their demands for integration of the building trades unions, city authorization of an immediate rent strike in rundown housing, a timetable for total integration of public schools, and an independent "public reveiew board" to investigate complaints of police brutality.

No Answer on Meeting

CORE leaders requested a meeting with the Mayor Thursday through Madison Jones, executive director of the City Commission on Human Rights. An answer is yet to come.

City Hal ladie Debs Myers said today he had information about any such request for a meeting.

The plan to tie up traffic next Wednesday already has been condemned by Mayor Wagner as "most unfortunate, ill chosen and illegal." President Johnson, who will be at the Fair opening, indirectly criticized the plan at a press conference, and most Negro civil rights leaders and supporters of the civil rights bill are strongly opposed to it. James Farmer, national director of CORE, has suspended the Brooklyn chapter for refusing in drop the plan.

Ways to Evade Law

Spokesman for the chapters say they have pledges for 1800 cars and expect another 1000 by Wednesday. There also is talk of using trucks to block entrances and exits to bridges and tunnels leading to the Flushing Meadow fair grounds.

Because of the new state-imposed regulation making it illegal to run out of gas on a major ihghway, bridge or tunnel local CORE leaders are now asking drivers of the pledged automobiles to "put your car on exhibit any way you see fit . . ."

Aside from running out of gas, they suggest, "stop and check your engine . . . the price . . . enjoy the scenery."

None of these, they point out in a widely distributed handbill, is an offense.

Last night, the Rev. Martin Luther King Jr., director of the Southern Christian Leadership Conference, told a Bronx fund-raising rally that non-violent demonstrations continue to be the "most potent weapon" in the civil rights struggle.

"The eye-for-an-eye philosophy ends up leaving everybody blind," King said.

But he went on to warn against a middle-of-the-road stand on civil rights, calling "moderation" a "tragic vice." King made no mention of the planned stall-in.

New Support Pledged

Jesse Gray, leader of the Community Council on Housing and organizer of the Harlem rent strikes, did speak out on the subject last night, throwing his group's support behind the plan and pledging 300 cars.

Meanwhile, to combat the stall-in, New Jersey Turnpike officials announced they will station tow trucks at several interchanges in the event cars are used to block toll plazas and approaches into New York City.

Next Wednesday the city's entire 26,000-strong police force will be on a special 12-hour shift.

SEE FRE REFERENCE - STATE OF NEW YORK V. GORE et al - CASE, 1963

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SUPREME COURT OF THE STATE OF NEW YORK
FIRST DEPARTMENT: APPELLATE TERM

----------X

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

ROBERT GORE and WALTER FLESCH,
Defendants-Appellants.

----------X

BRIEF OF DEFENDANTS-APPELLANTS

STATEMENT

This is an appeal from a judgment of the Criminal Court of the City of New York (QUINN, J.) rendered July 26, 1963, convicting the defendants of Unlawful Intrusion under Section 2036 of the Penal Law and Disorderly Conduct under Section 722(2) of the Penal Law. The defendants pleaded not guilty to both charges against them and were found guilty after trial. They were sentenced to sixty (60) days on each count, and the sentences, as far as each defendant was concerned, were to run concurrently. A Certificate of Reasonable Doubt was signed on July 26, 1963 by Mr. Justice Postel. This is an appeal from the sentences of the trial court on the ground that the sentence was excessive, as well as on the S. 2036 conviction.

THE STATUTES INVOLVED

Section 2036 of the Penal Law reads as follows:

"A person, who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof, or who erects or occupies thereon any hut, or other structure whatever without such authority; and a person who places, erects, or occupies within the bounds of any street or avenue of a city or village, any hut, or other structure, without lawful authority, is guilty of a misdemeanor."

Section 722(2) of the Penal Law reads as follows:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

(2) Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others."

FACTS

The instant appeal arises out of an incident of alleged unlawful intrusion upon real property and disorderly conduct connected with a racial protest by these defendants against illegal discrimination in the building trades union. The incident occurred at Monroe and Rutgers Street, in the borough of Manhattan, near the Rutgers Housing Project, a public housing project being constructed with public funds by the New York City Housing Authority.

During the morning of July 11, 1963, the defendants were engaged in lawful picketing on Rutgers Street near Monroe Street (76, 98)* as part of an organized protest against the discriminatory practices in the hiring of construction workers in the said housing project (93, 100).

At about 11:50 A.M., a truck delivering concrete to the construction site drove up Rutgers Street towards the project entrance on Rutgers Street and Monroe Street and began to turn on to Monroe Street to enter the project site (46). At that point, both defendants blocked the path of the truck by lying down or sitting down in front of the truck and blocking the entrance to the construction site (47, 77, 83, 99). The truck stopped and the defendant Flesch was carried over to the side by the police (35, 101). The defendant Gore remained there for approximately ten minutes (89).

By stipulation with the District Attorney, it was agreed that the substantive issue of whether or not the defendants were properly found guilty under Section 722(2) would be determined by the results of an appeal in People v. Penn, 48 Misc. 2d 634, 265 N.Y.S. 2d 155 (1st Dept., App. Term), aff'd. 16 N.Y. 2d 581(1965). This Court upheld the conviction in Penn and thus by virtue of the stipulation, defendants are not appealing the Disorderly Conduct

*Numbers in parentheses refer to the Record on Appeal.

conviction. The only question there, is whether or not the sentences imposed on these defendants are excessive. The convictions for unlawful intrusion, however, are being appealed.

POINT I

THE CONVICTIONS FOR UNLAWFUL INTRUSION SHOULD BE REVERSED.

A. EVEN UNDER THE MOST FAVORABLE INTERPRETATION, THE PEOPLE DID NOT PROVE THE ELEMENT OF INTRUSION. THE DEFENDANTS HAD A LAWFUL RIGHT TO BE WHERE THEY WERE, AND UNDER THE LAWSON AND COLLINS CASES, THEY WERE NOT GUILTY OF UNLAWFUL INTRUSION.

The defendants were accused in the complaints of unlawful intrusion because they lay across the entrance to a construction site, the entrance being on Rutgers and Monroe Streets (7,8). Much of the People's testimony centers around a fence and an open gate. The people maintain that the defendants lay down even with the two posts of the gate which was open at the time (35, 41, 47, 48, 54, 65), and refused to move when asked (66). The opening in the gate was eighteen feet (40). There was no other physical boundary except this fence and gate (39, 40).

Under People v. Stevens, 1888, 109 N.Y. 159, 16 N.E. 53, a criminal intent and a criminal mind to intrude is required for a conviction under Section 2036. Since the fence and the open gate represented the physical boundary of the property of the construction site, the People, in order to prove intrusion with a criminal intent,

must at least prove that the defendants intruded past the fence and gate and into the construction site. However, viewing the testimony most favorable to the People, the most that could be said is that these defendants were directly even with the posts of the gate (35, 41, 42, 48, 54, 65, 71).

There is absolutely no evidence in this record that these defendants intruded past the physical boundary of the open gate and went into the site. One of the People's witnesses, Bantum, stated (35):

> A. "He (Gore) was lying on the ground, I would say in line with the post to the gate."

The same witness also placed Flesch in the middle of the gate (41):

> A. "From my view he (Flesch) was approximately in the middle of the gate."

The truck driver and the policeman also placed the defendants even with the gate (47, 54). Patrolman Morrison stated that both defendants were right between the two posts (54):

> A. "I'd say they were lying about even in the driveway, the fence, right between the two posts."

The record is void of any evidence that these defendants ever went past this open gate. Thus no intrusion on to the property was ever proved.

In People v. Lawson, 44 Misc. 2d 578, 254 N.Y.S. 2d 300 (App. Term, 1st Dept., 1964), aff'd. 16 N.Y. 2d 552, 708 N.E. 2d 466, 260 N.Y.S. 2d 661, Mr. Justice Gold defined 'intrude' as "to thrust or force in without warrant or invitation, to invade". Certainly, if these defendants never went past imaginary boundary line of the open gate, it cannot be said that they intruded or that they invaded or that they thrust themselves on to the property of the construction site.

In order to intrude one must penetrate. Black's Law Dictionary defines an intruder as one who enters, and defines 'enter' as to impenetrate. Webster's Third New International Dictionary, unabridged, defines entry as a physical entrance or penetration. Since these defendants never penetrated onto the construction site, they never intruded.

These defendants had a lawful right to be where they were. According to the People's allegations and witnesses, they were even with an open fence that anyone could go up to, and where anyone could stand to observe the construction site. The gate was open and the opening was about eighteen feet. There was nothing in front of the open gate except an imaginary, unmarked boundary line (39, 40, 42). Anyone could enter up to this imaginary boundary line and observe the construction going on within the construction site.

Under People v. Collins, 44 Misc. 2d 430, 254 N.Y.S. 2d 182, (App. Term, 2nd Dept., 1964), aff'd. 16 N.Y. 2d 554, 268 N.E. 2d 467, and Lawson, supra, if one is lawfully on premises one is not guilty of unlawful intrusion. Their refusal to move does not constitute a violation under Section 2036.

In the instant case, the defendants had a right to go up to the fence and the open gate and no criminal intent can possibly be shown by the defendants going up to this point. They never intruded onto the construction site. According to the People's witness, they never went past the gate. The best that the People could say was that they were even with the gate posts. Since they were in a lawfully situated spot where anyone could enter, the Lawson and Collins cases are relevant and determining. The People did not prove, beyond a reasonable doubt, that these defendants intruded with a criminal intent.

B. THE PEOPLE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANTS WERE ON PRIVATE GROUNDS.

One of the elements of the crime of unlawful intrusion that the People must prove beyond a reasonable doubt is that the defendants intruded onto privately owned grounds. In People v. Minio, 1957, 7 Misc. 2d 803, 163 N.Y.S. 2d 995, the court held

that the boundary line between two houses was not established beyond a reasonable doubt for the court to hold that the defendant was on the private land of another.

In People v. Bury, 1927, 219 App. Div. 747 (2nd Dept.), the Appellate Division held that it was not sufficient to convict one of unlawful intrusion where one was on the land of a licensee or a concessionaire. One would have to own or lease the land and the land must be privately owned.

The People's own witnesses testified that Monroe and Rutgers Streets, where the fence is, is a throughway street in that area. Mr. Wylie, the driver of the concrete truck, testified very precisely on this point (46):

> Q. "Now, when you say you were making a turn onto Monroe Street, is Monroe a throughway street in that area?"
>
> A. "It is the entrance in the housing project."
>
> Q. "It is a throughway in that area?"
>
> A. "Yes."

Thus, Mr. Wylie, a witness for the People testified that the entrance to the construction site, where the defendants were lying, is a public throughway in that area. He further stated on cross examination (51) that the two public roads of

Rutgers and Monroe meet at the gate, where these defendants were.

Another witness for the People, Bantum, the job superintendent, testified that the ground in front of the gateway where the defendants were was a paved street (40):

Q. "What is on the ground when you walk through?"

A. "It's a paved street."

Q. "Paved street?"

A. "Yes."

Q. "And where theggate is, is there cement there?"

A. "Right; or asphalt."

The People never proved beyond a reasonable doubt that the gate and fence were on private grounds. One can speculate that the Housing Authority only had an easement and that this paved street and sidewalk were and are in the public domain. However, an easement, just like a license, is insufficient for prosecution under a criminal statute, which should be strictly construed.

C. THE COMPLAINT OF UNLAWFUL INTRUSION AGAINST EACH DEFENDANT IS INVALID ON ITS FACE.

The unlawful intrusion complaints against the defendants are identical, except for the defendants' names. The complaints state that each defendant committed the crime at the

Rutgers Housing Project at Rutgers and Monroe Streets. The essential allegations state the following (7, 8).

> "(the defendant) did commit the crime of unlawfully intruding on the real property of another in violation of 2036 of the Penal Law of the State of New York under the following circumstances: Deponent states that at the time and location aforementioned, the defendant did lie on his back across the entrance to the aforesaid premises obstructing the entrance to the project and stopping a truck that was about to enter the project. Attached is an affidavit of corroboration by Ptl. William J. Kaminski and Ptl. Alexander R. Morrison, who state that they requested the defendant on several occasions to move and he refused to do so."

These complaints do nt state that the defendants were intruding with a criminal intent, as required in People v. Stevens, 1888, 109 N.Y. 159, 16 N.E. 53. They do not state that the defendants went onto any premises without the authority of the owner, as required in People v. Barton, 1962, 18 A.D. 2d 612, 234 N.Y.S. 2d 263 (1st Dept.) in People v. Leiby, 1945, 184 Misc. 21, 52 N.Y.S. 493, the court held that the People had to state in the information that the defendant went on premises without the owner's authority.

The complaints don't state that these defendants intruded onto real property. Nor do they state that the land was privately owned. These complaints are totally without merit and should have been dismissed.

POINT II

THE SENTENCES IMPOSED WERE EXCESSIVE

A determination of whether or not a sentence is excessive is a function of the totality of circumstances concerning the acts and the background of the defendants. Accordingly, the following facts and considerations are listed as relevant to the total circumstances and, as a whole, indicate that this Court should exercise its discretion under Section 543 of the Code of Criminal Procedure to impose a sentence of no more than the one day time that has been served by each appellant.

A. A COMPARISON WITH OTHER CIVIL RIGHTS CASES DEMONSTRATES THAT THE DEFENDANTS WERE TREATED WITH GREATER SEVERITY THAN OTHERS SIMILARLY SITUATED.

The instant case was one of the first "civil rights" cases arising from the organized protests conducted at the Rutgers Housing Project. A review of other similar "civil rights" cases shows that the usual punishment was either a $25 fine or five days in prison in lieu of payment.

In Penn, supra, where the defendants were found guilty of sitting in front of and under the wheels of trucks, the sentence given was a $25 fine or five days. The defendants in the instant case are accused of, having been found guilty of, the very acts of which the defendants in Penn were found guilty.

Therefore, their sentences should be no greater than $25.00 fines or five days.

In People v. Kerster (1st Dept., App. Term), N.Y.L.J. p.8, col. 6, July 1, 1966, the defendants were convicted of sitting down in front of a cement mixer truck to bar its access to the construction site. The two defendants who pleaded guilty were given thirty days in the workhouse and the three who pleaded not guilty were given sixty days. No fine was imposed, either as an alternate or in addition.

The District Attorney's brief in the appeal proceedings stated that a review of 117 other "civil rights" cases in 1963 indicated that the usual punishment was either a $25.00 fine or five days. The brief stated at page 2:

> "Of all the sit-in cases considered by the Criminal Court in 1963, the present one was the first, and the sentences imposed in the present case are the highest. A review of 117 other sentences shows that the usual punishment was either a $25. fine, or five or ten day term of imprisonment, or a longer term in prison that was suspended."

The decision of this Court unanimously modified the judgment of conviction in Kerster, supra, by reducing the sentence to a fine of $25. or five days. This Court said:

> "Judgments of conviction unanimously modified on the law and on the facts by reducing the sentence to a fine of $25 or five days imprisonment, with due credit to

> be given for the one day imprisonment already served. Their instant convictions were the first in a great number of so-called 'civil rights sit-in' cases arising since 1963. A comparison of the average sentences imposed, with those given herein, demonstrates that appellants were treated with much greater severity than other defendants similarly situated. Considering this fact, together with the considerable time which has elapsed since appellants' last incarceration on these charges (see People v. Jones, 24 A.D. 2d 564), this court concludes that justice requires modification of the instant judgment."

The instant case was tried on July 24, 1963, the same day as the Kerster case, and thus was one of the first cases of this nature to be tried. Without the benefit of experience, the trial judge sentenced the defendants to sixty (60) days. However, the acts of these defendants are identical to those of the defendants in Kerster and justice requires the same result.

In People v. Corani, 42 Misc. 2d 247, 247 N.Y.S. 2d 609 (1st Dept., App. Term, 1964), Mr. Justice Hofstadter stated at page 259 that "relatively equivalent cases should receive relatively equivalent treatment." The above-named case and the case before the Bar are not only relatively equivalent cases, but are, indeed, identical cases. Under these circumstances, sixty (60) day sentences are excessive.

Considering these circumstances, together with the considerable time which has elapsed since the defendants' convictions on these charges, it would be inhumane to require them to serve these sentences, People v. Jones, 24 A.D. 2d 564 (1st Dept., 1965).

B. THE CONVICTIONS OF DISORDERLY CONDUCT DO NOT CONSTITUTE CRIMES.

One of the important factors in this case is the fact that a conviction under Section 722 is not a conviction of a crime. Section 722 covers various offenses which are neither felonies nor misdemeanors. Conviction does not require a finding of moral turpitude (sometimes called "general criminal intent" or "mens rea"). Thus there would seem to be a presumption that one found guilty is not to be treated like a criminal and not sentenced unless there is good reason for requiring a sentence. There are no good reasons in this case. All the pertinent factors and considerations lead to the conclusion that the sentences are most unusual and harsh, without serving a valid social purpose.

C. DEFENDANTS DID NOT ACT AS CRIMINALS

The criminal law is generally aimed at preventing anti-social conduct of the sort that we consider to be selfserving. There are circumstances where the penal law is appropriate in

order to regulate even non-self-serving types of behavior. But, surely, the issue of whether or not the type of behavior for which a defendant is convicted is self-serving is crucial to whether or not it is appropriate to impose a term of imprisonment. Appellants here engaged in action which served in no way to further their own fortunes. In no sense can one say that these two appellants were self-aggrandizing.

One may concede that they were misguided to take this kind of action to further their laudable goals. But it seems entirely inappropriate to impose a jail term. One can presume that individuals, motivated as these individuals were, do not require the threat of punishment to bring about those second thoughts and considered judgment that will aid in avoiding a repetition of this kind of conduct. If this presumption turns out to be wrong in an individual case, then this conviction stands on the record as a guide to the court if a repetition occurs.

CONCLUSION

For the various reasons stated above, the convictions for unlawful intrusion should be reversed and these complaints dismissed, and the sentences modified or suspended.

Respectfully submitted,
ROBERT B. SAGINAW
Attorney for Defendants-Appellants
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New York, New York

CARL RACHLIN
STEPHEN H. HAGLER, Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
FIRST DEPARTMENT: APPELLATE TERM

----------X

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

ROBERT GORE and WALTER FLESCH,
Defendants-Appellants.

----------X

SUBSTITUTION OF ATTORNEY

I hereby certify that upon consent of Shirley Fingerhood, Esq., who represented defendants-appellants below, Robert Saginaw, Esq. has been substituted for Shirley Fingerhood, Esq. on this appeal.

I am associated with both attorneys for the purposes of this appeal and am fully familiar with the facts in this matter. Both attorneys have offered their services without fee.

Stephen M Nagler
STEPHEN N. NAGLER, Esq.

COURT REPORTER'S MINUTES

Criminal Court of the City of New York

Part 2-D, County of NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK
on the complaint of
Ptl. ALEXANDER MORRISON &
Ptl. WILLIAM J. KAMINSKI
vs
WALTER FLESCH & ROBERT GORE,
Defendants.

BEFORE
Hon. T. VINCENT QUINN
Judge.

July 24, 1963

CHARGES: Violations of 2036 & 722, Subd. 2, of Penal Law

TRIAL ~~HEARING~~

APPEARANCES:
For the People ROBERT J. LEHNER, ESQ.
Assistant District Attorney
For the Defense SHIRLEY FINGERHOOD, ESQ.
1270 Sixth Avenue, New York 20, N.Y.

WITNESS	DIRECT	CROSS	RE-DIRECT	RE-CROSS
(See Index, Page 3)				

Carol M. Wright
Official Court Reporter

CRIMINAL COURT OF THE CITY OF NEW YORK
PART 2-D : : BOROUGH OF MANHATTAN

THE PEOPLE OF THE STATE OF NEW YORK : Docket #B-5391
B-5390
-on the complaint of- :
PTL. ALEXANDER MORRISON : Charge: Violation of 2036 of the Penal Law
-vs- :
WALTER FLESCH and ROBERT GORE, :
Defendants. : T R I A L

THE PEOPLE OF THE STATE OF NEW YORK :
-on the complaint of- : Docket #C-11550
C-11549
PTL. WILLIAM J. KAMINSKI : Charge: Violation of 722, Subd. 2
-vs- :
WALTER FLESCH and ROBERT GORE, :
Defendants. : T R I A L

100 Centre Street
New York 13, New York
July 24, 1963

B E F O R E:

HON. T. VINCENT QUINN
Justice

(cont'd)

A P P E A R A N C E S:

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For the Defendants:

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1270 Avenue of the Americas
New York 20, New York

GERALD SPIELBERG
and
NEIL SULLIVAN
Court Officers

CAROL M. WRIGHT
Official Court Reporter

****

I N D E X

WITNESSES FOR THE PEOPLE	Direct	Cross	Redirect	Recross
HAROLD KLORFEIN	8 - 11			
HARRY COKELEY	12- 22			
ROBERT BANTUM	22- 28	28 -33		
JOHN WYLIE	34- 39	39 -42		
ALEXANDER MORRISON	42- 47	47 -52		
WILLIAM KAMINSKI	53- 58	58 -60	60 - 61	62 - 62
WITNESSES FOR THE DEFENDANTS				
ROBERT BROOKINS GORE	65- 70	70 -85		
WALTER FLESCH	86- 90	90 -94		

****

E X H I B I T S

For the People: No.	Description	Page
1 for Ident	Slip of Paper containing Sketch extracted from Specification Book showing Project Fence	14
2 for Ident	Copy of Blueprint of Plan for Rutgers Housing Project	16
2 in Evd	Same as Exhibit 2 for Ident, now in evidence	18

****

Motion....pp 62-64

Motion.....pp 95-100

THE BRIDGEMAN: Dockets B-5391, Walter Flesch, charged with violation of 2036 of the Penal Law, and Disorderly Conduct, Subdivision 2; arresting officer A. Morrison, 16th Precinct.

THE COURT: Is the officer here?

THE BRIDGEMAN: Yes, your Honor.

THE COURT: Walter Flesch?

THE BRIDGEMAN: Outside.

THE DISTRICT ATTORNEY: May we have a second call. I believe the people just stepped outside.

DEFENSE COUNSEL: May I ask for substitution of attorneys? I am representing Mr. Flesch.

THE COURT: What is your name?

DEFENSE COUNSEL: Shirley Fingerhood, 1270 Sixth Avenue.

THE COURT: Ready?

MISS FINGERHOOD: Yes.

THE DISTRICT ATTORNEY: The People are ready. May we have it marked ready?

THE COURT: Marked Ready.

THE BRIDGEMAN: Dockets #B-5390 and #C-11549, Robert Gore; arresting officer W. Kaminski, charged with violation of 2036 of the Penal Law and Disorderly Conduct, Subdivision 2. State your appearance, Counsel.

DEFENSE COUNSEL: Shirley Fingerhood, 1260 Sixth Avenue.

THE COURT: Ready on these?

MISS FINGERHOOD: Yes.

THE COURT: Marked Ready.

****

THE BRIDGEMAN: Recalling Dockets #C-11549, Robert Gore, and #B-5390, Robert Gore, charged with violation of 2036 of the Penal Law, and Disorderly Conduct 2. Counselor, would you state your notice of appearance?

DEFENSE COUNSEL: Shirley Fingerhood, 1270 Sixth Avenue, appearing for Mr. Gore.

THE BRIDGEMAN: The defendant pleads--

MISS FINGERHOOD: Not Guilty.

THE BRIDGEMAN: Dockets #C-11550, Walter Flesch, charged with Disorderly Conduct, Subdivision 2, and B-5391, same defendant,

charged with violation of 2036 of the Penal Law. Counsel?

MISS FINGERHOOD: Same counselor representing Mr. Flesch.

THE COURT: This 2036 is a Misdemeanor and the defendants have a right to a trial before a panel of three judges.

MISS FINGERHOOD: We waive that right.

THE COURT: Do you waive preliminary hearing?

MISS FINGERHOOD: Yes.

THE COURT: The defendant Robert Gore pleads Not Guilty?

MISS FINGERHOOD: Yes.

THE COURT: Are you ready for trial or do you seek an adjournment?

MISS FINGERHOOD: Ready for trial.

THE COURT: All right. Now, with regard to the Disorderly Conduct on Robert Gore, how does the defendant plead?

MISS FINGERHOOD: Not Guilty.

THE COURT: Now, the defendant Walter Flesch: The 2036 of the Penal Law, as I stated

before, is a Misdemeanor and he has a right to a trial before a panel of three judges.

MISS FINGERHOOD: He waives that right.

THE COURT: And does he waive the preliminary hearing?

MISS FINGERHOOD: Yes, he does.

THE COURT: And what is the defendant's plea?

MISS FINGERHOOD: Not Guilty.

THE COURT: Is the defendant ready for trial?

MISS FINGERHOOD: Yes, he is.

THE COURT: Now, on the Disorderly Conduct, does the defendant plead Guilty or Not Guilty?

MISS FINGERHOOD: Not Guilty.

THE COURT: And is he ready for trial?

MISS FINGERHOOD: Yes, he is.

THE COURT: All right. Now, is there any application on the part of the People in these cases?

THE DISTRICT ATTORNEY: Yes, your Honor. I ask that the four cases, the two

2036 charges and the two 722, Subdivision 2, charges, be tried together as to these two defendants with separate verdicts rendered to each, without the necessity of reswearing witnesses, and with separate verdicts as to each charge.

THE COURT: That the 2036s and the 722s be tried together?

THE DISTRICT ATTORNEY: Yes, all four charges be tried together with separate verdicts as to each defendant on each charge.

THE COURT: Is that satisfactory with the defendants?

MISS FINGERHOOD: Yes.

THE DISTRICT ATTORNEY: People ready for trial and People call to the stand Harold Klorfein.

THE BRIDGEMAN: Step up, face the Judge, raise your right hand.

H A R O L D K L O R F E I N, called to the stand as a witness on behalf of the People, upon first being duly sworn by the Court, testified as follows:

THE BRIDGEMAN: Be seated. Now, what is your name?

THE WITNESS: Harold Klorfein.

THE BRIDGEMAN: Where do you live?

THE WITNESS: Eleven Stuyvesant Oval, New York City.

THE BRIDGEMAN: Business or occupation?

THE WITNESS: Secretary of the New York City Housing Authority.

THE COURT: May I have this witness' name?

THE WITNESS: Klorfein, K-L-O-R-F-E-I-N, Harold.

DIRECT EXAMINATION:

BY THE DISTRICT ATTORNEY:

Q Mr. Klorfein, how long have you been secretary of the New York City Housing Authority?

A Approximately thirteen years.

Q On July 11, 1963, were you secretary of the New York City Housing Authority?

A Yes.

Q And are you familiar with the Rutgers Housing project in New York County?

A I didn't hear the question.

Q Are you familiar with the Rutgers Housing project in New York County?

A In a general way, yes.

Q Do you know where it is located?

A Yes.

Q Where is it located, sir?

A It is located between Madison and Cherry Streets and Pike and Rutgers.

Q And do you know who owns the property between those streets?

A The New York City Housing Authority.

Q And are you an officer of the New York Housing Authority?

A Yes.

Q On any date did you give each of these defendants, Mr. Flesch or Mr. Gore, permission to enter the construction site at the Rutgers Housing site?

MISS FINGERHOOD: I object to the question, your Honor. It is not within the Information. The Information does not charge that they were not given permission.

THE COURT: Well, it does charge that

they unlawfully intruded.

MISS FINGERHOOD: I know, but under the statute he is trying to prove they were not given authority which is a specific allegation.

THE COURT: The objection is overruled.

MISS FINGERHOOD: Exception.

THE COURT: Answer the question.

THE WITNESS: The answer is No.

Q Of your knowledge, did any officer of the New York City Housing Authority give permission to either of these defendants to enter the project site, the Rutgers Housing site, on July 11, 1963?

A To my knowledge, none did.

THE DISTRICT ATTORNEY: You may inquire.

MISS FINGERHOOD: No questions.

THE COURT: You may step down.

THE DISTRICT ATTORNEY: Mr. Cokeley, please.

THE BRIDGEMAN: Face the Judge and raise your right hand.

H A R R Y C O K E L E Y, called to the stand as a

witness on behalf of the People, upon first being duly sworn by the Court, testified as follows:

THE BRIDGEMAN: State your name, address, business or occupation.

THE WITNESS: Harry Cokeley, 11 Brookview Boulevard, Spring Valley, New York; I am a Construction Superintendent for the New York City Housing Authority.

DIRECT EXAMINATION:

BY THE DISTRICT ATTORNEY:

Q Sir, where are you presently assigned as a Construction Superintendent?

A The Rutgers Housing project.

Q And is that in the County of New York?

A Yes.

Q And on July 11, 1963, where were you assigned?

A At the Rutgers Housing project.

Q As Superintendent of Construction, what are your duties?

A To supervise the coordination of constructors engaged in the construction of a five-building

housing project and supervise the inspection and enforcement of the specifications and plans.

Q Now, are you familiar with the fence guarding the construction site on the Rutgers site?

A Yes, sir.

Q And are you familiar with the property line on Rutgers Street which separates the project from the public thoroughfare?

A Yes.

Q And are you familiar with where, in relation to the property line, is the fence guarding the Rutgers project on Rutgers Street?

A The fence is located two feet beyond the -- two feet inside the property line, parallel with the property.

Q In other words, there is a two-foot space after reaching the property line from the thoroughfare, before you get to the fence?

A Yes.

THE DISTRICT ATTORNEY: I ask that this slip of paper be marked for identification, People's One.

THE COURT: Is that two feet from

the building line?

THE DISTRICT ATTORNEY: From the property line.

(Marked People's Exhibit 1 for Identification by Court Officer)

BY THE DISTRICT ATTORNEY: (cont'g)

Q I show you the slip of paper, People's Exhibit 1 for Identification and ask you what is it?

A This is a sketch taken out of the specification book for this project. It indicates the location of the project's fence in relation to the property line.

Q And are you familiar with the entire construction area?

A Yes.

Q Is this an accurate representation of the construction area of the Rutgers Housing project?

A It is.

THE DISTRICT ATTORNEY: I offer People's Exhibit 1 for Identification in evidence.

MISS FINGERHOOD: I object, your Honor. There is no scale on this and Mr. Lehner is asking about scale on the basis of this.

THE COURT: I beg your pardon?

MISS FINGERHOOD: I don't see any scale on this.

(Conference between District Attorney and Defense Attorney)

THE COURT: Do you know who prepared this map?

THE WITNESS: No, I don't. Do you mean the sketch or the specifications?

THE COURT: Is it something that was prepared by someone connected with the New York City Housing Authority?

THE WITNESS: Yes. It was part of the specifications for the job. It's a page out of the book.

MISS FINGERHOOD: If your Honor please, he said he didn't know. How could he know it is out of a book?

THE DISTRICT ATTORNEY: Do you object?

MISS FINGERHOOD: Yes.

THE COURT: Sustained.

Q What book is this a page out of?

A The specifications for the construction

of the project.

Q And where is this book kept?

A I have a copy in the field office on the site.

Q And where did you get this book?

A Sir?

Q Where did you get this book?

A It was at the site when I was assigned to the site.

Q Now, after looking at this page out of this book and looking at the site itself, would you say that this is a fair and accurate representation of the site itself?

A It is. Its dimensions are there clearly.

THE DISTRICT ATTORNEY: I reoffer this into evidence as People's Exhibit One.

MISS FINGERHOOD: I object.

THE COURT: Sustained.

THE DISTRICT ATTORNEY: I ask this slip of paper be marked People's Exhibit Two for Identification.

(Marked People's Exhibit 2 for Identification by Court Officer)

BY THE DISTRICT ATTORNEY: (cont'g)

Q I show you People's Exhibit Two for Identification and ask you do you know what this is?

A Yes, this is a copy of a blueprint showing -- this is a detailed site plan for the Rutgers Housing project.

Q And do you know who prepared that?

A The architect, Hart Gejerman and Associates.

Q And do you know whether or not that is a certified blueprint?

A Yes. The seal appears on this, "Registered Architect Charles Hart, Number 1306."

Q Now, did you ever see this blueprint before?

A Yes, we have a copy of this at the field office.

Q And, in fact, did you procure this blueprint and give it to me earlier this week?

A Yes.

Q Where did you obtain it from?

A From my field office.

THE COURT: Is that a blueprint of the Rutgers Housing site?

THE WITNESS: Yes, sir.

THE DISTRICT ATTORNEY: I offer this

blueprint into evidence.

MISS FINGERHOOD: I object on two grounds, your Honor, one of which is that there is no indication this site follows the blueprint.

THE COURT: That what?

MISS FINGERHOOD: That is follows the blueprint. He said he got it day before yesterday or something and gave it to Mr. Lehner. The other ground is that I really think this is irrelevant to the charge in this case. They have not charged the defendants with entering into the project, but lying across the entrance. The Information does not state that they were on the property or on private property.

THE DISTRICT ATTORNEY: Well, the charge is, your Honor, intrusion onto real property.

THE COURT: Objection overruled.

THE DISTRICT ATTORNEY: May we have it marked?

(Marked People's Exhibit Two in Evidence by Court Officer)

BY THE DISTRICT ATTORNEY: (cont'g)

Q I show you People's Exhibit Two in Evidence and ask you to indicate--

MISS FINGERHOOD: Excuse me. May I see it?

THE DISTRICT ATTORNEY: Surely.

(Document handed to Defense Attorney)

THE DISTRICT ATTORNEY: Withdrawn.

(Conference between Defense Attorney and two Defendants)

Q I show you People's Exhibit Two in Evidence and ask you if you would indicate where the entrance to the project is on Rutgers Street?

A By pencil?

Q If you would, yes.

A Here (indicating).

Q And would you indicate where the project property line is in relation to this entrance?

A Right here (indicating) as indicated.

MISS FINGERHOOD: I object, your Honor. There is no picture of that entrance on that map.

THE COURT: Well, he has indicated where it is.

MISS FINGERHOOD: From that?

THE COURT: From the map, yes. From the blueprint.

A (cont'g) This is the entrance to the construction site (indicating).

Q Will you put a Number 1 on the entrance to the construction site at Rutgers Street?

(Witness complied)

Q Will you please put a Number 2 on the property line on Rutgers Street of the project?

(Witness complied)

Q Will you please put a Number 3 where the fence is in relation to the Rutgers Street project entrance?

MISS FINGERHOOD: I object, your Honor. There is no fence on that map and there is no way to tell what he is doing.

THE COURT: He is indicating where the fence is, with reference to the blueprint, on the blueprint.

MISS FINGERHOOD: But there is no foundation for him saying he knows where it is on that blueprint.

THE COURT: Objection overruled.

THE COURT: (cont'g) Now, Number 1 is what?

THE DISTRICT ATTORNEY: The entrance, the break in the sidewalk.

THE COURT: And Number 2?

THE DISTRICT ATTORNEY: The property line.

THE COURT: And 3?

THE DISTRICT ATTORNEY: Is the fence.

Q Would you draw a line on Number 2 showing the line? You just have a Number 2 there.

A Yes.

(Witness complied)

A (cont'g) It's written right on top of the property line.

Q I see.

THE DISTRICT ATTORNEY: Your Honor, I offer the People's Two to your Honor for inspection.

MISS FINGERHOOD: I object to this, your Honor.

THE COURT: Well, I have already -- Mr. District Attorney, will you assist the

Court with the Defense Attorney?

(Discussion off the Record.)
(Conference at the Bench)

THE DISTRICT ATTORNEY: No further questions.

THE COURT: Do you have any questions?

MISS FINGERHOOD: No, your Honor.

THE COURT: All right. Step down. Next witness.

THE DISTRICT ATTORNEY: Mr. Bantum.

THE BRIDGEMAN: Step up, raise your right hand, face the Judge.

R O B E R T B A N T U M, called to the stand as a witness on behalf of the People, upon first being duly sworn by the Court, testified as follows:

THE BRIDGEMAN: What is your name?

THE WITNESS: Robert Bantum, B-A-N-T-U-M.

THE BRIDGEMAN: Where do you live?

THE WITNESS: 652 Shady Street, Hempstead, New York.

THE BRIDGEMAN: What is your occupation?

THE WITNESS: Job Superintendent at

Rutgers Housing for S. S. Silverblatt, Incorporated.

DIRECT EXAMINATION:

BY THE DISTRICT ATTORNEY:

Q What is S. S. Silverblatt, Inc.'s connection with the Rutgers project?

A S. S. Silverblatt is the contractor for general construction on the job.

Q And what are your duties for S. S. Silverblatt?

A I supervise and coordinate the activities that come under the general construction phase of the work.

Q On July 11, 1963, were you present at the construction site in the morning?

A Yes, I was present.

Q And what business was being carried on at the construction site under your supervision?

A In the main, it was the erection of the reenforced concrete structure of the buildings.

Q And what materials were being used for this reenforcement?

A The materials involve the reenforcement concrete work such as concrete itself, reenforcing bars, lumber.

Q Was there any cement being used?

A Yes, there was.

Q Is there a subcontractor to S. S. Silverblatt? Is that Silverblatt's full name?

A S. S. Silverblatt.

Q Is there a subcontractor that supplies cement?

A We have a division which is listed a subcontractor which does the concrete work.

Q That's a division of S. S. Silverblatt?

A Yes.

Q What is that called?

A John A. Johnson & Sons Company, Division of S. S. Silverblatt.

Q Do you know whether Johnson Company hires a vendor to supply cement?

A S. S. Silverblatt hired the vendor, the Transit Mix Corporation.

Q Do you know what the duties of Transit Mix Corporation are in relation to the Rutgers project?

A To supply and control concrete for the job.

Q And how do they do that?

A By means of trucks.

Q On July 11,1963, was Transit Mix supplying

cement to the construction site by means of these trucks?

A Yes, they were.

Q Do you recall being at the entrance to the Rutgers construction site, at approximately 11:50 A.M.?

A Yes, I was at the Rutgers entrance to the job at that time.

Q Did you observe something at that time?

A Yes, I did.

Q What did you observe?

A I heard a commotion at the Rutgers Street entrance and when I arrived at the scene, I saw Mr. Flesch here being removed from the gateway, and Mr. Gore was laying on the ground in front of the concrete truck.

Q Where was the concrete truck in relation to the opening in the fence?

A It was a few feet from the gate; he had just made his turn.

Q And where was Mr. Gore at the time you saw him lying down?

A He was laying on the ground, I would say, in line with the post to the gate.

THE COURT: May we have the indicated on the map? That is, on the diagram, on the blueprint?

BY THE DISTRICT ATTORNEY: (cont'g)

Q Would you say that was in the Rutgers Street side in the entrance to the project? Is that correct?

A Right in the gateway.

THE COURT: I mean, will the witness indicate -- if he can.

THE DISTRICT ATTORNEY: I don't know whether the witness is familiar with blueprints; however, I will show it to him.

(Document handed to Witness)

THE COURT: Now, according to the testimony of Mr. Klorfein, the entrance is marked #1; the property line is marked #2, and the fence is marked #3. Now, can you -- with that in mind -- indicate where the Defendant Gore was lying and where you saw the Defendant Flesch?

THE WITNESS: If I can.

THE COURT: All right.

THE WITNESS: Right here (indicating). He was lying in the gateway which is on Line #3.

THE COURT: On Line #3?

THE WITNESS: Yes, which is the fence line.

THE COURT: Indicated by #3. Is that as to both defendants?

THE WITNESS: Well, when I arrived this Flesch was being carried away. He was not on the ground.

BY THE DISTRICT ATTORNEY: (cont'g)

Q Where was he in relation to the truck?

A He was in front of the truck, being removed.

Q Where was he in relation to the fence at the time you saw him being removed?

A I don't understand that question.

Q Where was Mr. Flesch in relation to the truck and the fence at the time you saw him being carried by the officers?

THE COURT: Was he inside?

THE WITNESS: Approximately in the gateway.

THE COURT: Where were you?

THE WITNESS: I was some twenty feet away.

Q When you mention Mr. Gore and Mr. Flesch, do you see them in Court today?

A Yes, I do.

Q Will you point them out?

A Mr. Gore to the right, my right; Mr. Flesch on my left.

THE DISTRICT ATTORNEY: Identifying the two defendants individually. You may inquire.

CROSS EXAMINATION:

BY MISS PINGERHOOD:

Q Mr. Bantum, you say you were twenty feet away when you saw this incident. Where were you?

A Well, I was on Monroe Street which is a dead street that runs through the middle of the project and I heard this commotion at the gate. When I arrived at the scene it was twenty feet away.

Q Were you north of the gate or south of the gate?

A I was west of the gate. Monroe Street runs east and west.

Q Were you inside the project or outside?

A Inside.

Q Facing toward the outside of the project?

A Well, when I heard the commotion I faced toward the outside of the project.

Q When you saw this incident, were you facing toward the outside of the project?

A I was facing toward the outside.

Q And about how many feet inside the project were you?

A When I arrived to see what was happening, when I could see what was happening, it was about twenty feet inside the project.

Q And then, I gather from what you said, you were looking directly outside, toward the outside, through the gateway?

A Right.

Q Now, this gateway, was it closed or was it open?

A It was open.

Q Do the doors swing open or shut?

THE DISTRICT ATTORNEY: Objection to that question, your Honor. I think it is a little ambiguous.

THE COURT: Well--

A (interrupting) It's with two halves on hinges.

Q When the doors are open, are the doors

outside the project or inside the project?

A Inside the project.

Q They open into the project?

A Right.

Q What does the ground in front of the gate-way look like?

A It's a former street with curbs.

Q What is on the ground when you walk through?

A It's a paved street.

Q Paved street?

A Yes.

Q And where the gate is, is there cement there?

A Right, or asphalt.

Q Do you know which?

A Not at this particular location.

Q Is there dirt there?

A There is some dirt there covering the pavement.

Q Covering the pavement?

A Yes, right.

Q How wide is this gate?

A Eighteen feet.

Q And when you looked outside you saw Mr. Flesch being carried away?

A Right.

Q Was he inside the gateway?

A From my view he was approximately in the middle of the gate. He was in front of the concrete truck which was making its turn into the project.

Q You testified he was being carried away?

A Right.

Q Well, how far had they carried him?

A He was being carried away...

Q Yes?

A ...at the time I arrived at the scene where I could clearly see what was happening.

Q Did you also look at the posts of the gate?

A No, not at that time.

Q When you looked at Mr. Gore, where was he?

A He was laying on the ground.

Q Did you look at the posts of the gate when you saw him?

A Yes, I did, because he continued to lay there and I stood in the gateway myself.

THE COURT: Just answer the questions.

THE WITNESS: Yes, sir.

BY MISS FINGERHOOD: (cont'g)

Q Then you were looking directly at Mr. Gore and he was laying on the ground?

A Right.

Q Was he to your left or to your right?

A At one time I was standing directly over him.

Q When you were looking at him from twenty feet away, was he to your left or to your right?

A He was in front of me.

Q When you were facing where you were facing, was Mr. Flesch to Mr. Gore's left or to Mr. Gore's right?

A From my view he was on the right of Mr. Gore, being carried away.

Q And when you came up to Mr. Gore, did you measure the distance he was away from the posts?

A No, I did not measure it.

Q And was there any boundary line there?

A The fence and the gate itself.

Q But the gate was open?

A Yes.

Q Was there any boundary line?

A No. Unmarked.

MISS FINGERHOOD: That's all.

THE DISTRICT ATTORNEY: No further questions.

THE COURT: Let's adjourn now to 2:00 o'clock.

THE DISTRICT ATTORNEY: If your Honor please, may I ask at this time whether the witnesses who have testified will be recalled? Otherwise, we will excuse them.

MISS FINGERHOOD: No.

THE COURT: You may be excused. Thank you.

(The Court then recessed until 2:00 o'clock P.M.)

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A F T E R N O O N S E S S I O N

(The trial was continued.)

THE COURT: Case on trial.

THE BRIDGEMAN: Recalling Docket #B-5391, Walter Flesch, charged with 2036 of the Penal Law, and Docket #C-11550, same defendant, charged with Disorderly Conduct; and

#B-5390, Robert Gore, charged with 2036 of the Penal Law, and Docket #C-11549, Robert Gore, charged with Disorderly Conduct, Subdivision 2. This is a continued case from this morning, your Honor.

THE COURT: I believe we have finished with Mr. Bantum.

THE DISTRICT ATTORNEY: Yes, sir. Mr. Wylie.

THE BRIDGEMAN: Step up, raise your right hand and face the Judge.

J O H N W Y L I E, called to the stand as a witness on behalf of the People, upon first being duly sworn, testified as follows:

THE BRIDGEMAN: State your name, address, business or occupation for the record.

THE WITNESS: John Wylie, W-Y-L-I-E, 24 Brookwood Avenue Parkway, Jackson, New Jersey.

THE COURT: What is your occupation?

THE WITNESS: Truck driver.

DIRECT EXAMINATION:

BY THE DISTRICT ATTORNEY:

Q Sir, whom are you employed by?

A Transit Mix.

Q And on July 11, 1963, were you employed by Transit Mix?

A Yes.

Q And what were your duties that day?

A Bringing concrete to Silverblatt.

Q And where were you delivering it from and where were you taking it to?

A I was pulling the truck out of 23rd Street and East River yard and delivering it to Rutgers and Monroe.

Q That's Rutgers and Monroe Streets in the County of New York?

A (nodded head affirmatively)

Q Approximately how many trips did you make on July 11, 1963 to that construction site?

A That was my third.

Q When did you make your first?

A About 8:00 o'clock.

Q And approximately when did you make your second?

A About 10:00.

Q And when did you make your third?

A About 11:30.

Q And when you made your third trip, what street did you enter coming to the construction site?

A Rutgers.

Q And after driving up Rutgers Street, what did you do?

A I was making a turn on Monroe and two fellows come across the gate and laid down in front of the truck.

Q Now, when you say you were making a turn onto Monroe Street, is Monroe a throughway street in that area?

A It is the entrance in the housing project.

Q It is a throughway in that area?

A Yes.

Q Where did these two people -- did you see where these people came from?

A They were standing on the gate.

THE COURT: On the gate? Standing on the gate?

THE WITNESS: Yes, or on the walk.

THE COURT: They were in that area?

THE WITNESS. Yes.

Q What, if anything, did they do?

A Well, they walked in front of the gate and somebody said, "Somebody's lying down in front of the truck," so I stopped the truck.

Q And where did you stop the truck?

A Approximately four feet from the gate.

Q And where were the defendants laying in relation to the gate?

A Well, I stopped the truck and I got out of the truck and I seen one of the defendants being carried away and one was laying directly across the gate.

Q The two people that came in front of your truck and were lying in front of your truck, did you see them in Court?

A Yes.

Q Will you point them out, please?

A There (pointing), and there.

THE DISTRICT ATTORNEY: Indicating the two defendants separately.

Q Now, you said you saw one of the defendants being carried away?

A Yes.

Q Do you know which one that was?

A That one (indicating).

THE DISTRICT ATTORNEY: Indicating Mr. Flesch.

BY THE DISTRICT ATTORNEY: (cont'g)

Q And where was he at the time you saw him being carried away?

A I didn't see where he was at the time but I seen them carrying him past the truck.

Q And did you see where the other defendant was when you got out of the truck?

A Yes, he was lying in front of the gate.

Q And where, in relation to this fence, was he lying?

A Across the entranceway, right across the entrance where the trucks go in, even with the two posts.

Q Even with the two posts?

A I would say so, yes.

Q What happened next?

A I parked the truck and I got out and the defendant just laid there until the officers come over and they waited for the paddy-wagon, I guess, and they took them away, and I drove into the project.

Q How long was your truck at this particular place, approximately four feet from the entrance to that gateway?

A Ten or fifteen minutes, I guess.

Q And during those ten or fifteen minutes, did you see where Mr. Gore was?

A Yes, lying in front of the gate.

Q Laying where?

A Lying in front of the gate.

Q Where in relation to the gate?

A Between the two posts.

Q Between the posts?

A Yes.

Q Did you eventually bring that cement truck into the project?

A Yes.

THE DISTRICT ATTORNEY: You may inquire.

CROSS EXAMINATION:

BY MISS FINGERHOOD:

Q When you make a turn from Rutgers Street to Monroe Street, is there an incline?

A Yes.

Q Where does the incline begin?

A By the park, I'll say, I don't know the name of the street, at the beginning of the housing project

coming up Rutgers.

Q On Rutgers the incline begins?

A All Rutgers is inclined; the whole street is inclined.

Q And is there a further incline on Monroe?

A No, it levels off at Monroe.

Q Does the entrance on Monroe Street which we have been referring to as an entrance, is it flat?

A When you enter the project, yes.

Q Where it crosses Rutgers, is Monroe Street flat?

A Where it crosses, I would say it is fairly flat, yes.

Q It's very flat. And what is the roadbed of Monroe where it meets Rutgers like?

A The condition?

Q Yes.

A Well, it has dirt on it. The gateway you are talking about?

Q I am talking about where Monroe and Rutgers Streets meet; you were turning your truck, you said, from Rutgers Street to Monroe Street. Is that what you said?

A Right.

Q And I would like to know where Rutgers Street meets Monroe Street.

A At the gate.

Q Where Rutgers Street meets Monroe Street, what is the condition of the road?

A The condition?

THE COURT: You mean proceeding on Rutgers? You want to know whether it is inclined?

MISS FINGERHOOD: No. Rutgers and Monroe Streets meet and I want to know the condition of the road where they meet.

THE COURT: You mean whether it's even or uneven?

MISS FINGERHOOD: Uneven or even, covered with dirt.

Q Describe it.

A Fairly flat land covered with dirt.

Q Is the dirt even?

A I couldn't tell you whether it's even or not. It's fairly flat.

Q Is it bumpy?

A No, it's fairly flat.

Q Is there a lot of dirt over the concrete?

A I couldn't tell you.

Q Does the dirt begin before the posts of the gate?

A I couldn't tell you that.

Q Is there dirt on Rutgers Street?

A On the street? No.

Q I see. Were the wheels of your truck on dirt when you stopped?

A I couldn't tell you.

THE COURT: When you stopped in front of the gate.

THE WITNESS: I can't tell you.

MISS FINGERHOOD: Thank you. That is all.

THE DISTRICT ATTORNEY: No further questions. Officer Morrison.

P T L. A L E X A N D E R M O R R I S O N, called to the stand as a witness on behalf of the People, upon first being duly sworn by the Court, testified as follows:

THE BRIDGEMAN: Give your name, shield number and assignment.

THE WITNESS: Patrolman Alexander Morrison, Shield #22918, 16th Precinct.

DIRECT EXAMINATION:

BY THE DISTRICT ATTORNEY:

Q Officer, on July 11, 1963, were you doing a tour of duty?

A Yes, I was, 6:00 A.M. to 2:00 P.M.

Q How were you dressed doing your tour of duty?

A In the uniform of a police officer.

Q Do you recall where you were just before noon on that day?

A I was on Rutgers Street, opposite the LaGuardia Houses.

Q And what did you observe, if anything, at that time?

A Well, it was about 11:50, a little before noon. I was across the street. I noticed a commotion. I saw the truck in the driveway and I saw police officers going over. I crossed the street and when I got there I saw the two defendants lying down in the gateway where the truck goes through, the driveway.

Q When you say the two defendants, do you

see them in Court?

A Yes.

Q Will you point them out, please?

A Mr. Flesch and Mr. Gore. (indicating)

THE DISTRICT ATTORNEY: Indicating the defendants individually.

Q Where were they in relation to the fence?

A I'd say they were lying about even in the driveway, the fence, right between the two posts.

Q What happened next?

A Well, there were about five or six police officers around Mr. Flesch and they were asking him to get up and--

Q Were these officers in uniform?

A Yes, they were all in uniform.

Q What, if anything, did Mr. Flesch do or say?

A The only comment I can think of -- I'm not sure it was mentioned just then. Like I say, he was asked a few times to get up and move to let the truck go by; the only comment I can recall is, "I am sorry. I have nothing against you but I can't help you," something to that effect.

Q Now, where was the truck at that time?

A The truck was approximately four feet in front of them -- the defendants.

Q In what direction was the truck facing?

A The truck was facing towards the project, going inside the project.

Q What happened next?

A Well, we asked the defendants to move and they refused.

Q Did he say or do anything besides what you told us?

A Besides saying he was sorry he couldn't help us, no. He was informed he was under arrest and he was picked up and carried to the side, to the left side.

Q What happened next?

A He sat there. I believe he got up once. He wanted to go, I believe, to see Mr. Gore but he was informed that he was under arrest and to stay on the side. Mr. Gore was still lying down in the driveway and he sat down again and he waited there until the wagon came.

Q What happened when the wagon came in relation to Mr. Flesch?

A When the wagon came, we asked him if he would walk to the wagon and he said again, "I am sorry."

"I have nothing against you but I can't help you," and we carried him to the wagon.

Q You carried him and placed him in the wagon?

A Yes, sir.

Q Did you see where Mr. Gore was during this time?

A Mr. Gore was lying down in the driveway.

Q Where in relation to the fence?

A Approximately the same spot as the beginning, right between the two posts.

Q And did you see when Mr. Gore was moved?

A Yes, it was just about the same time as Mr. Flesch was moved.

Q The second time. But Mr. Gore was moved for the first time?

A Yes, when they were going to the wagon.

Q Do you know approximately how much time elapsed from the time you saw Mr. Gore and Mr. Flesch between the posts of the gate and the time Mr. Gore was carried to the wagon?

A To the time Mr. Gore was carried to the wagon?

Q Yes.

A I would say that was about ten minutes.

Q And how much time between the time you saw Mr. Flesch lying between the posts and the time he was arrested?

A That was about two minutes. Then he was moved over to the side. He was the first one moved.

THE DISTRICT ATTORNEY: No further questions.

CROSS EXAMINATION:

BY MISS FINGERHOOD:

Q I don't think I have this right. You came on the scene and when you got there you saw the defendants lying down?

A That is correct.

Q Where did you come from?

A Directly across the street.

Q You were standing across the street?

A That is right.

Q And then what did you do?

A I walked across the street to where the defendants were in front of the truck.

Q Did you walk to the left of the truck or to the right of the truck?

A To the left. I saw Mr. Flesch first.

Q Was the truck directed down Monroe Street?

A Well, it had come up Rutgers Street. I didn't see the truck come in; it was parked in the driveway pointing toward the inside of the project. I presume it had come up Rutgers.

Q Was the truck on Monroe Street?

A Yes, that's the driveway of the street there. It was in the intersection of Monroe and Rutgers, facing inwards to the project.

Q And what did you do when you got to where the defendants were lying?

A When I got there?

Q Yes.

A I came to see what was happening. I saw them lying down and the other police officers and myself were asking them to move.

Q What did you do?

A What did I do?

Q Yes.

A I asked them if they would move.

Q Who did you ask whether he would move?

A Mr. Flesch.

Q And what did the other officers do?

A The other officers were asking the same thing.

Q How many officers?

A I would say five or six officers.

Q All standing around asking Mr. Flesch if he would move?

A They were asked if they would move to let the truck go by.

Q And then what happened?

A We picked them up.

Q Who picked them up?

A I would say three or four officers.

Q And where did you move him to?

A I didn't hear you.

Q Where did you move him to?

A Toward the street and to the left of the truck. I believe it was on the curb. We placed him near some barriers.

Q When you moved him, he was lying in front of the truck, you said?

A That is correct.

Q Did you move him directly to the side of the truck?

A I don't understand what you mean by that.

Q When you moved him...

A Yes.

Q ...you moved him to the right, facing the housing project, you said.

A No, I was standing outside facing the housing project. We moved him to the left.

Q I see. About how many feet did you move him?

A Ten or fifteen feet.

Q And where did you drop him?

THE DISTRICT ATTORNEY: Objection, your Honor. There is no testimony as to dropping him.

THE COURT: The objection is to the word "dropped".

Q Where did you leave him?

A We placed him by the curb, like I said, near the barriers. I assume it was the curb. I don't remember the exact spot.

Q When you say you assume it was the curb, Mr. Morrison, where did the curb begin?

A I have no recollection as to where it

begins. I know we took him to the fence and put him to the side.

Q There was a curb?

A I really don't remember.

Q You don't know whether or not there is a curb?

A No. I know there is a sidewalk there.

Q How wide is the sidewalk?

A The walk is covered by building materials with lumber and everything else and we had to barricade it off, so I couldn't testify as to the size of the sidewalk.

Q I see. And about how wide is the space between the lumber material on one side of the walk and the lumber material on the other side of the walk?

A That would be the distance between the fences? Is that what you mean?

Q I asked you how far it was between the lumber material on one side of Monroe Street and the lumber material on the other side of Monroe Street?

A Approximately fifteen feet.

Q Yes, and after you carried Mr. Flesch, when you put him down, did you place him in front of the lumber material?

A No. It's not actually lumber material. It's barriers there. The lumber material is over the walk. This is, I assume, to keep stuff from falling down on people walking. There were barriers set up where they were supposed to picket on the side. The driveway was separated by barriers. We placed him right by the barrier.

Q Was this in front of the walk?

A Yes, I believe it was. I am sure it was in front of the walk.

Q If you don't know where the curb was, how do you know how wide the walk is?

A Whether there is a curb or not I don't know because of the material there.

Q Then how could you tell it was the walk if you couldn't tell where the curb was to the walk?

A It's concrete. You can see it right there.

Q You can't see where it ends?

A Well, it ends where there is a driveway to go into Monroe Street.

Q I see.

MISS FINGERHOOD: Thank you very much.

THE COURT: All right, step down.

Thank you.

THE DISTRICT ATTORNEY: No further questions, your Honor.

THE DISTRICT ATTORNEY: (cont'g) Patrolman Kaminski, please.

THE BRIDGEMAN: Step up, face the Judge and raise your right hand.

W I L L I A M J. K A M I N S K I, called to the stand as a witness on behalf of the People, upon first being duly sworn, testified as follows:

THE BRIDGEMAN: State your name, shield number and assignment for the record.

THE WITNESS: Patrolman William J. Kaminski, Shield #22650, 21st Precinct.

DIRECT EXAMINATION:

BY THE DISTRICT ATTORNEY:

Q Officer, on July 11, 1963, were you doing a tour of duty?

A Yes, I was.

Q What was your tour of duty?

A 6:00 A.M. to 2:00 P.M. at the Rutgers Street Housing project.

Q Is that in the County of New York?

A Yes, it is.

Q How were you dressed at that time?

A In uniform.

Q Full uniform?

A Yes.

Q Do you recall where you were shortly before noon of that day?

A I was standing on the sidewalk on Rutgers Street, right next to the gate.

Q What gate would this be?

A Going into the housing project.

Q Did you observe something at this time and place?

A Yes.

Q What did you observe?

A I observed the concrete truck coming into the project and as it was coming into the project, the two defendants came over and laid down, obstructing the truck.

Q When you say the two defendants you saw, do you see them in Court?

A Yes, I do.

Q Will you point them out, please?

A Mr. Flesch and Mr. Gore. (indicating)

THE DISTRICT ATTORNEY: Indicating the two defendants individually.

BY THE DISTRICT ATTORNEY: (cont'g)

Q Now, where did you see Mr. Flesch and Mr. Gore go to?

A They laid down between the gate.

Q And is this the gate that is leading in the project on Rutgers Street?

A Yes, it is.

Q Where, in relation to the posts on either side of this fence, did you see them?

A Parallel with the two posts.

Q You mean on a line between the two posts?

A Yes.

Q Where was the truck?

A Entering the project.

Q And how far from this imaginary line between the two posts was the truck?

A Three to four feet.

Q What next did you observe?

A Well, they were lying between the two posts in the project and we went over and asked them if they would please move.

Q Who asked who?

A I asked Mr. Gore and Mr. Flesch, directing the question to both of them, to please move, that they were obstructing the truck.

Q What, if anything, did either of them say or do?

A At first they both remained mute.

Q What happened next?

A I was asking them to please move; I asked them if they were sick or injured. I got no reply. I asked them three times in succession, "Would you please move?"

Q Who did you ask, "Are you sick or injured?"

A Mr. Gore.

Q Did he say anything?

A At the time he didn't reply to me.

Q What did you say after that?

A I asked them three times in succession, "Please move", and that's when he said to me, "I am sorry, I can't help you."

Q "Sorry, I can't help you?"

A Yes.

Q Where was Mr. Flesch at this time?

A Mr. Flesch was beside Mr. Gore.

Q What happened next?

A Mr. Flesch was removed from obstructing the truck.

Q Were you one of the officers that removed him?

A No, I was not.

Q What happened next?

A Well, after informing them they were under arrest, that they had broken the law, we remained waiting for the patrol wagon to remove them.

Q Where was Mr. Gore at the time he was placed under arrest?

A Lying on the ground between the two fence posts.

Q Approximately how much time elapsed between the time you first asked Mr. Gore to leave until you placed him under arrest?

A A matter of a minute.

Q Where was Mr. Gore after he was placed under arrest?

A Lying on the ground.

Q And did a police wagon come sometime later?

A Yes.

Q And approximately how much time later was Mr. Gore removed from that particular spot?

A Ten minutes.

Q What happened at that time?

A I had to carry Mr. Gore into the wagon with the help of three other patrolmen.

Q Did you say anything to him at that time?

A I asked him to walk to the wagon.

Q Did he say anything?

A Just about every time I asked him a question he said, "I'm sorry; I can't help you."

Q How was Mr. Gore taken to the wagon?

A Carried.

Q By how many officers?

A Four.

THE DISTRICT ATTORNEY: That's all. You may inquire.

CROSS EXAMINATION:

BY MISS FINGERHOOD:

Q Mr. Kaminski, how wide was the sidewalk fronting on Rutgers Street, where Rutgers Street meets Monroe Street?

A How wide would the sidewalk be?

Q Yes.

A At Monroe Street?

THE COURT: Do you know?

THE WITNESS: Three or three-and-a-half feet.

Q When you saw Mr. Gore and Mr. Flesch, were they lying parallel to the sidewalk?

A Yes, between the two posts of the gate.

Q Were the posts of the gate next to the sidewalk?

A No, I believe they are in towards the project a little bit.

Q In your direct testimony, Mr. Kaminski, you said that Mr. Gore and Mr. Flesch were lying two or three feet from an imaginary line. What do you mean by an imaginary line?

THE DISTRICT ATTORNEY: Objection, your Honor.

THE COURT: I don't recall any two or three feet being mentioned. Do you recall any such testimony? It's possible but I don't recall it.

MISS FINGERHOOD. I wrote it down, sir. The District Attorney asked him how far he was from this imaginary line and he said two or three feet.

THE DISTRICT ATTORNEY: I would like for that to be re-read.

THE COURT: Do you recall being asked that question?

THE WITNESS: No, your Honor.

BY MISS FINGERHOOD: (cont'g)

Q Mr. Kaminski, did you speak to Mr. Flesch?

A When I first arrived on the scene,yes.

Q How many police officers were there at the scene when you arrived?

A I was the first police officer on the scene.

Q After you spoke to Mr. Flesch, did you speak to Mr. Gore?

A Yes.

Q I see. Thank you.

THE COURT: All right.

THE DISTRICT ATTORNEY: May I have one further question?

THE COURT: Yes.

REDIRECT EXAMINATION:

BY THE DISTRICT ATTORNEY:

Q Where, in relation to the imaginary line between the two posts of the fence, did you see the two defendants lying?

A Let me see if I have your question. Imaginary line?

Q The line between the two posts of the fence. When the gates are open there is a line between the two fences?

MISS FINGERHOOD: Objection on that.

THE COURT: Sustained as to form. After a line was drawn between the two gates. Fix in your mind if a line were drawn between the two gates. Is that what you have in mind?

THE DISTRICT ATTORNEY: Yes.

THE COURT: Ask the question.

Q Where were the defendants in relation to this imaginary line?

A Exactly between the two posts.

THE DISTRICT ATTORNEY: No further questions.

MISS FINGERHOOD: May I ask a question?

THE COURT: Yes, surely.

RECROSS EXAMINATION:

BY MISS FINGERHOOD:

Q Mr. Kaminski, you were standing in front of the truck talking to the defendants. Was it possible to see both posts?

A Yes.

Q Was it possible to see both posts and the defendants at the same time?

A No, not at the same time.

MISS FINGERHOOD: Thank you.

THE COURT: All right, step down.

THE DISTRICT ATTORNEY: No further questions, your Honor. That's the People's case.

THE COURT: May I see the blueprints, please?

(Documents handed to the Judge)

MISS FINGERHOOD: Your Honor, I move to dismiss against both of these defendants. Section 2036 is a misdemeanor statute--

THE COURT: I am sorry, I didn't hear you. You say you move to dismiss, then

you said--

MISS FINGERHOOD: The charge. This is a misdemeanor statute in which the Information does not charge acts constituting a violation of that statute. The Information charges that these defendants laid on their backs across the entrance. It does not say that they were on the premises. It does not say that they intruded on private premises. We have no evidence in this record that these premises were private. As a matter of fact, it has been referred to by the People's witnesses as a public street, Monroe Street. I don't believe this statute can be interpreted to cover people who unintentionally may pass an imaginary boundary line which nobody has really seen and which is not the mark-off to a private part of land, and where there is no testimony on the record that this was private land.

I believe, also, the Information does not give warning of the charge that the defendants violated this statute in that the

Information does not state they were on the premises as is required by the statute, or that they did not have the permission of the owner of the premises, which is also required by the statute.

THE COURT: All right. That motion is denied as to both defendants.

MISS FINGERHOOD: I would also move to dismiss the 722 charge on the ground that there is no evidence in the record that there was any public disturbance here, or that anybody was interfered with or annoyed. This is a situation in which we have had testimony from police officers that these defendants stopped a single truck, and that they were moved promptly, the figure used, "for one minute", I believe. There is no testimony there was any public commotion or that anybody was disturbed.

THE COURT: That motion is denied as to both defendants.

MISS FINGERHOOD: I call Mr. Gore.

THE BRIDGEMAN: Step up, face the

Judge, raise your right hand.

(At this point Defendant Gore advised the Court he would not swear, whereupon the Court substituted the words "affirm and promise".)

R O B E R T B R O O K I N S G O R E, called to the stand on his own behalf, upon first affirming, testified as follows:

THE BRIDGEMAN: State your name, address, business or occupation.

THE WITNESS: Robert Brookins, B-R-O-O-K-I-N-S, Gore; 620 West 147th Street.

THE COURT: Your occupation?

THE WITNESS: Assistant Community Relations Director, for the National Office of the Congress of Racial Equality.

THE COURT: Do you realize even though you have only affirmed, that you are still bound by the laws of perjury?

THE WITNESS: Yes.

THE COURT: Proceed.

DIRECT EXAMINATION:

BY MISS FINGERHOOD:

Q Mr. Gore, on July 11, 1963, did you go to Rutgers and Monroe Streets in New York City?

A I did -- and what street?

Q Monroe.

A Yes.

Q At about what time did you get there?

A I believe it was around 11:30.

Q What did you do when you got there?

A I joined a group of picketers who were to the east of Monroe Street--to the west of Monroe Street.

Q Is there a project called Rutgers Housing project on one side of Rutgers Street, crossing Monroe Street?

A Yes.

Q Were you picketing on the right or left of Monroe Street facing Rutgers Street?

A On the left of Monroe facing Rutgers.

Q About how long a time did you spend on the picket line?

A About twenty minutes or so.

Q And then what happened?

A A truck was coming up Rutgers Street and it was apparent that it was going to turn into what I now know is Monroe Street, and I went under a barricade. I took the picket sign I was carrying and laid it on the

ground and went under the barricade, first sat down, then laid down in front of the truck.

Q Where was the barricade you went under?

A Outside the construction site on the left of Monroe Street.

Q About how far did it intrude into Rutgers Street?

A I would guess at least a quarter of the way.

Q How many feet?

A I'm not good at this. I would say fifteen to twenty feet.

Q Did the barricade begin after the walk which bounded Rutgers Street?

A To the best of my knowledge, the barrier was outside the walk.

Q I see. Mr. Gore, did you intend to lay down on the housing project's private property?

A No.

THE DISTRICT ATTORNEY: I didn't hear the answer.

THE WITNESS: No.

Q Mr. Gore, did you know where you were in relation to the fence which is around the Rutgers Housing project?

A Yes.

Q Where were you?

A To the best of my knowledge, while I was lying down -- it was not easy to see -- but to the best of my knowledge, I was to the north of the fence.

Q Would that be to the road side?

A Yes.

Q How many feet away from the fence were you?

A The gate was open.

Q Right from the fence itself, from where the gate began.

A I don't know.

Q Was there a demarcation point between the two posts of the entrance?

A No, there wasn't.

Q From where you were laying, could you see the two posts?

A I could see the one which was in front of me.

Q When you say "in front of me", do you mean between you and the project?

A No, I was lying -- as I was lying there, there was one post behind and one before. The project was

to my right; Rutgers Street was to my left.

Q Were you on a parallel line between the two posts?

A Parallel to what?

Q These posts are parallel to each other, are they not?

A Yes.

Q Were you in front of the line, the parallel line, which would link them together or on it?

A I was to the Rutgers Street side of this parallel line, if there were one.

Q I see. Thank you. Now, how many pickets were there, Mr. Gore?

A I think there were, roughly, a dozen.

Q How many policemen were there, Mr. Gore?

A Somewhere between fifteen and twenty, I would guess.

Q Were there any reporters and cameramen?

A Yes, there were.

Q About how many?

A There were a number of people in plain-clothes. Some of them may have been policemen; some of them may have been reporters. I would guess, maybe, ten

or fifteen of these people.

Q Were those people there when you arrived?

A Yes.

Q Did any additional people come when you laid down in front of the truck?

A I did not see any additional people, no.

Q I see. Mr. Gore, why did you lie down in front of the truck?

A It was an attempt to halt the construction at this particular site. Previously we had asked the Mayor to halt the construction as a result of the discriminatory hiring practices that we believed were being carried on at this site. The Mayor took no action. We had asked the Governor to do the same. He had taken no action. So we thought, perhaps, by our dramatizing the situation, this illegal situation as we felt, perhaps we could convince the Mayor that he should uphold his own laws.

Q When you say "we", of whom do you speak?

A The Congress of Racial Equality.

Q And you are employed by the Congress of Racial Equality?

A Yes.

MISS FINGERHOOD: I see. Thank you, Mr. Gore.

CROSS EXAMINATION:

BY THE DISTRICT ATTORNEY:

Q On July 11, 1963, were you sent by the Congress of Racial Equality to the Rutgers site?

A No.

Q Previously to that, were you sent by the Congress of Racial Equality to the construction site?

A No.

Q Did any one send you to that particular site?

A No.

A No.

Q When did you first arrive that that particular site, the Rutgers Housing project?

A It was approximately 11:30.

Q Was that the first day you were there?

A Yes...well, I had been in the area before but this was the first day I was there in connection with the discrimination.

Q Were you there in connection with the CORE picketing that was occurring at that time?

A Yes.

Q Were you one of the organizers of this picketing?

A No.

Q How did you come to arrive at the Rutgers site? Did anyone tell you to be there?

A No.

Q Was there a meeting beforehand in which you attended?

A No.

Q When you arrived at the site, what did you see?

A I saw the picketers there and the police who were there.

Q And what did you do after arriving there?

A I joined the group of pickets.

Q And where did you walk?

A We walked in a circle -- well, in an oval, really, to the west of the entrance.

Q What time did you start picketing and what time did you finish your picketing?

A I started, roughly, around 11:30. I don't know exactly what time it was. And apparently stopped around ten minutes of 11:00 -- 12:00, excuse me.

Q At the time you stopped picketing, what did you do?

A I took the picket sign off and went under the barrier.

Q Where was this barrier in relation to the fence?

A We have been talking about a fence. Now, it is not clear in my mind--

THE COURT: Gate.

THE WITNESS: Yes.

A (cont'g) The barriers were -- well, the barriers were in Rutgers Street; the gate itself is in Monroe Street.

Q Well, how far is this barrier from the gateway which leads from the project on Rutgers Street?

A I would guess twenty feet; I don't know.

Q After going under this barrier, what did you do?

A Because the truck was coming to gain entrance to the project I went to where the entrance of the project was and lay down.

Q Anybody else go with you?

A Yes -- well no, not with me.

Q Did anyone else follow you?

A After I arrived there I observed someone

else there.

Q Was it this defendant?

A Mr. Flesch.

Q Where did you go when you arrived there?

Q I went to in front of the truck, in the middle of the gateway, between the gateway and the truck.

Q You said "in the middle of the gateway"?

A When I said the middle, I meant -- you know, there are two poles here and I was in the center of these two poles, not where they are but in terms of the distance between the two poles.

Q And how far were you from the imaginary line connecting the two posts?

A I am not able to say how far I was but, to the best of my knowledge, I was to the Rutgers Street side of this imaginary line.

Q Approximately how far?

A Not very far; I don't know. I wasn't in a measuring mood at the time.

THE COURT: Would any part of your body, would you say, have touched the imaginary line?

THE WITNESS: I would think not.

THE DISTRICT ATTORNEY: (cont'g)

Q Then you saw the gate, the posts, on either side of you when you were laying down?

A I could see the one post.

Q Well, how far in front of that post were you?

A When you say "in front of", I am not sure of what you mean.

Q In front of the line connecting the two gates.

A I see. I was just to the Rutgers Street side of it.

Q Is that within one foot?

A Within one foot, I would say.

Q Within one foot of the imaginary line connecting the two posts, is that correct?

A I would say so.

Q And where was Mr. Flesch?

A Mr. Flesch was sitting directly in front of me. I was lying down; he was sitting.

Q When you say directly in front of you, which way were you facing?

A My feet were pointed east. My head was pointed west. Mr. Flesch was toward my feet.

Q And you say your head was pointed east?

A My feet were pointed east.

Q And therefore you would be parallel to the imaginary line connecting the posts?

A Correct.

Q Where was Mr. Fleach?

A Toward my feet.

Q And how far away from your feet?

A It's hard to see that from a lying position.

Q Approximately?

A I don't know.

Q And would he be on a point which would be the same distance away from the imaginary line as you were?

A I would think so, yes.

Q How far was the truck from you?

A Several feet.

Q Could you give us a rough estimation?

A Several feet. If I said five feet I might be off; if I said two feet I might be off.

Q Between two and five feet?

A It may have been one foot. I wasn't paying that much attention.

Q At the time you sat down, was the truck

Q And you say your head was pointed east?

A My feet were pointed east.

Q And therefore you would be parallel to the imaginary line connecting the posts?

A Correct.

Q Where was Mr. Flesch?

A Toward my feet.

Q And how far away from your feet?

A It's hard to see that from a lying position.

Q Approximately?

A I don't know.

Q And would he be on a point which would be the same distance away from the imaginary line as you were?

A I would think so, yes.

Q How far was the truck from you?

A Several feet.

Q Could you give us a rough estimation?

A Several feet. If I said five feet I might be off; if I said two feet I might be off.

Q Between two and five feet?

A It may have been one foot. I wasn't paying that much attention.

Q At the time you sat down, was the truck

still moving?

A I think not.

Q What happened after you sat down?

A Two police officers dragged me away and deposited me near the barrier.

Q Did they say anything prior to dragging you away?

A To the best of my recollection they said nothing, just dragged me away.

Q How far did they drag you?

A From where I was sitting or lying to the barrier which I would say was about fifteen or twenty feet. I am not sure.

Q What happened then?

A I got up and went back and laid down again.

Q This time, where did you lie down?

A The same place.

Q Where was Mr. Flesch at the time you went back?

A I believe he was not there when I went back; I am not sure. The time sequence is not clear.

Q At this time did you sit down or lie down?

A I lay down.

Q What happened next, sir?

A Several police officers gathered around and several newsmen and they were having discussion amongst themselves -- the police officers were.

Q Did you hear what that conversation was?

A I recall one of the officers mentioning something about -- they were discussing whether I was trespassing or, this was the general discussion, if there was any law I was breaking, what the law was.

Q And the word "trespass"?

A I do recall that word specifically being used.

Q Did you do anything after you heard the word "trespass"?

A I lay down.

Q At the same spot?

A Yes.

Q Did you lay at the same spot at which you had been lying?

A The whole time I was lying there I was moving.

Q You said after you heard the word "trespass", you just continued to lie there, is that correct?

A Correct.

Q You said you were laying in the same spot, is that correct?

A Right.

Q Up to this time were you placed under arrest?

A To the best of my knowledge, I never heard any one say, "You are under arrest."

Q After you heard the word "trespass"--

MISS FINGERHOOD: I object, your Honor. He hasn't said who said the word "trespass".

THE COURT: He said the police were discussing it and he heard the word "trespass."

MISS FINGERHOOD: But I think it is irrelevant.

THE COURT: Objection overruled.

BY THE DISTRICT ATTORNEY: (cont'g)

Q After you heard this voice say "trespass", how long were you laying on that spot between the two posts before you moved?

A I would judge about ten minutes. Excuse me. Would you ask that question again? I want to be clear

exactly what it is you are asking.

THE DISTRICT ATTORNEY: May we have the question read?

(Reporter re-read last Question)

A Approximately ten minutes. The reason I asked you that again, Mr. District Attorney, is because I think that's two questions.

Q Did you understand the question?

A I don't think so. I wish you would ask it again so I can understand it better.

Q After you heard the word "trespass", how long were you laying in your position before you were moved by the officers?

A The answer -- I would have to give the answer, "I don't know", because I don't know the time sequence when I heard him and when I first sat there.

Q What is your answer?

A I would have to answer, I don't know.

Q Well, approximately how long?

A I don't know.

Q Didn't you just give the answer of ten minutes?

MISS FINGERHOOD: I object. He said

he didn't know.

THE COURT: Objection sustained.

BY THE DISTRICT ATTORNEY: (cont'g)

Q During the time that you were lying in your position between the two gates and, you say, not more than a foot--

MISS FINGERHOOD: I object. He is testifying.

THE COURT: Let him finish.

Q --not more than a foot in front of the imaginary line joining the two posts, what did any officer say to you?

MISS FINGERHOOD: I object.

THE COURT: As to the form of the question, the objection is sustained.

Q Well, during the time you were lying between the two posts--

THE DISTRICT ATTORNEY: Withdrawn.

Q During the time you were lying in the position in which you have testified to, what, if anything, did any officer say to you?

A The only thing I recall the officer saying to me directly is, "I am asking you for the last time to move."

Q What, if anything, did you say or do after you heard that?

A I said words to the effect that, "I am sorry but I am unable to cooperate with you at this time."

Q Are those all the words you heard the officer use?

A To me, yes.

Q Did you hear any other words directed to you and Mr. Flesch?

A None.

Q What other words did you hear while you were lying down?

A A lot of people were saying a lot of things.

Q Your testimony is only once did an officer ask you to move?

A To my recollection, only once.

Q From the time you said, "I'm sorry, I can't help you out", to the time you were taken away, how long was that?

A I believe it was immediately after I said words to the effect, "I am sorry, I can not cooperate with you", that I was taken away.

Q You say the purpose for your being there

was to demonstrate?

A No, sir.

Q What was the purpose?

A My reason for being there was to point up the fact that despite laws in New York State and New York City, discrimination still existed in the building trades, and I wanted to dramatize and point this up so the Mayor and Governor would take action.

Q How did you intend to dramatize this?

A By doing what I did, by halting construction.

Q Did you intend to get arrested?

A No.

A No.

Q Did you know by what you were doing you would be arrested?

A No.

Q The person that asked you to move you told him, "I am sorry, I can't help you", was he in police uniform?

A I don't know. I wasn't looking, really.

Q Did you know him to be a police officer?

A I don't know.

Q Who did you think he was?

A I didn't know; I wasn't looking. I was

looking straight ahead of me.

Q Did you know what was going on inside the construction site?

A (no response)

Q (cont'g) Did you know if there was any construction being accomplished inside the site?

A There appeared to be work going on, yes.

Q Did you know who was erecting the houses?

A When you say "who", I am not sure.

Q What entity?

MISS FINGERHOOD: I object.

THE COURT: I beg your pardon?

MISS FINGERHOOD: I object.

THE COURT: Objection overruled.

A I knew it was a city housing project, if that's what you mean.

Q Did you know the property was owned by the Housing Authority?

A No, I didn't.

Q You knew there was a project being constructed at that site?

A Yes.

Q And you saw a fence at that site, did you not?

A I saw a gate.

Q On either side of the gate was there a fence?

A I'm not sure; there must have been, but I don't recall seeing it. I want to make the distinction because I don't want to testify to something I'm not sure of.

Q Have you seen gates in the past?

A Yes.

Q In your experience in the past, have gates been dividing lines between an interior and an exterior?

MISS FINGERHOOD: I object,your Honor.

THE COURT: Objection sustained.

Q What did you understand that gate to divide?

MISS FINGERHOOD: I object,your Honor.

THE COURT: Sustained.

THE DISTRICT ATTORNEY: No further questions.

THE COURT: All right. You may step down.

(Conference at the Bench between Court, Defense Counsel and District Attorney)

MISS FINGERHOOD: I call Mr. Flesch.

THE BRIDGEMAN: Step up, face the Judge, raise your right hand, keep your voice up.

(Defendant Flesch advised Court he

does not swear.)

THE COURT: Do you promise to tell the truth and the whole truth?

DEFENDANT FLESCH: Yes, I promise.

THE COURT: You realize, even though you have not sworn to tell the truth before God, you are liable to the laws of perjury if you tell an untruth?

DEFENDANT FLESCH: I understand that.

THE COURT: All right.

W A L T E R F L E S C H, called to the stand as a witness on his own behalf, on affirmation, testified as follows:

THE BRIDGEMAN: Give your name, address, business or occupation.

THE WITNESS: Walter Flesch, 178 Thompson Street, New York City, waiter.

DIRECT EXAMINATION:

BY MISS FINGERHOOD:

Q Mr. Flesch, on July 11, 1963, did you go to Rutgers and Monroe Streets?

A Yes, I did.

Q And about what time did you go there?

A Oh, 11:30.

Q What did you do when you got there?

A I joined the picket line.

THE COURT: Keep your voice up.

THE WITNESS: I joined the picket line there.

Q How long were you on the picket line?

A Twenty minutes.

Q What were you doing on the picket line?

A We were marching around in a circular way.

Q How many people were there besides you?

A Ten people.

Q How many policemen were there?

A Twenty.

Q Were there many other people around?

A There were some spectators across the street.

Q Was there any traffic on the street?

A I wasn't watching. You mean before the truck came?

A When you arrived at the scene and you were marching up and down, the picket line, was there any traffic on Rutgers Street?

A I didn't notice.

Q Where were you marching on the street, Mr. Flesch?

A We were marching to the left of Monroe Street.

Q And you were on Rutgers Street?

A Yes.

Q Were you on the sidewalk?

A No.

Q Were you in the street?

A Yes.

Q About how far into the street did you intrude?

A About fifteen or twenty feet, I guess.

Q And how broad is the street?

A About thirty feet, I guess.

Q Were you conscious of cars passing by as you were picketing?

A Yes, there were some.

Q How many?

A I would say, generally speaking, I think the traffic was scarce.

Q I see. Tell us what happened after you

stopped picketing, Mr. Flesch.

A I took my picket sign off and I went under the barricade and I sat in the entranceway.

Q About how wide was the barricade?

A About fifteen feet.

Q What did it consist of?

A It was one of these wooden horses.

Q Was it the length of the usual wooden horse that we use?

A Yes.

Q And did you go directly under it?

A Yes.

Q And as you went under it, did you go straight or did you go to the left or did you go to the right?

A I went straight.

Q And did you sit down while you were still going straight?

A Yes.

Q And how far from the sidewalk were you when you sat down?

A How far from the truck was I? I don't know. We--

Q I asked you where you were.

A When the truck came up?

Q No, when you were laying down. Look, Mr. Flesch, if the truck was above you, you could see it?

A Yes. Could you repeat that question?

Q Where you were lying down, could you see the truck?

A Yes.

Q How far from you was it?

A Five feet.

Q Right, five feet. Thank you.

MISS FINGERHOOD: That's all.

CROSS EXAMINATION:

BY THE DISTRICT ATTORNEY:

Q Mr. Flesch, what was your reason for being at the site that day?

A To protest the discrimination--

THE COURT: I can't hear you.

A ---protest the discrimination in the building trade unions.

Q What was your purpose in sitting down in front of the truck as it was entering the site?

A Well, I felt that since there was discrimination going on there, this construction site should be

closed down.

Q Did you understand that truck to be entering that site for workers to perform certain work there?

A Yes, I understood that.

Q You stated you sat in the entrance. Is that correct?

A Yes, in the path that led up into the construction site.

Q Where did you sit in relation to the gate?

A I would say a little bit on front of it.

Q Of what?

A You asked me where I was sitting in relationship to the gate. I said somewhat in front of it.

Q How far in front of it?

A Oh, I don't know -- a foot or two.

Q A foot or two?

A Yes, but it's approximate.

Q What happened after you sat down in front of the truck?

A Well, about four or five policemen, maybe more, came over and they hauled me over to the side.

Q Did they say anything to you?

A No, they didn't.

Q How long were you sitting in front of the truck before the police came and hauled you over?

A I would say a few minutes.

Q During those few minutes, were there any police around you?

A Yes, they were around me.

Q Did any of them say anything that you heard?

A Not that I recall, no.

Q What happened next?

A As I said, they dragged me over to the side.

Q Then what happened?

A They put me down. I got up; I started to walk back to where I had been. One of them grabbed me and said, "You are under arrest."

Q Then what did you do?

A I just stood there.

Q What happened next?

A Well, eventually the paddy wagon came and I walked into the van.

Q You walked into the van or were you carried?

A No, I walked in. I was carried to the side, but I walked into the van.

Q You sat down originally. Where did you sit in relation to Mr. Gore?

A I was parallel to him.

Q How far away from him?

A Ten feet.

Q Did you know what was being constructed at that site?

A Yes, I did.

Q What do you know to be constructed there?

A It was a City housing project.

Q Did you know who owned the property there?

A No, I didn't.

Q When you sat down, did you see the fence?

A I saw the post behind me.

Q And you saw the posts on either side of the gate before you sat down?

A Could you repeat that?

Q Did you see the posts on either side of the gate before you sat down?

A No, I don't think I saw them before I sat down, no.

Q Before you were moved from there, did you see the gate?

A I think I noticed, mainly, the posts.

Q Did you see that before you were moved?

A Yes.

Q Did you know that was the gate leading into the construction site?

A Yes.

THE DISTRICT ATTORNEY: No further questions.

THE COURT: Did you hear Officer Morrison testify you were carried into the van?

THE WITNESS: Yes.

THE COURT: Do you say that isn't so?

THE WITNESS: Yes, that is right. It isn't.

THE COURT: Any more questions?

MISS FINGERHOOD: No.

THE COURT: All right, step down. Has the Defense any other witnesses?

MISS FINGERHOOD: No, it rests.

THE COURT: Both sides rest?

THE DISTRICT ATTORNEY: People rest. Excuse me, your Honor, I didn't hear whether the Defense rests.

THE COURT: Defense said they rest.

THE DISTRICT ATTORNEY: People rest, your Honor.

THE COURT: Your motion.

MISS FINGERHOOD: Sir, I would like to renew my motion to dismiss the Information. I believe that the Information against both of these defendants, the two Informations, do not allege a violation of Section 2036. They state simply that the defendants lay on their back across the entrance to the premises, obstructing the entrance. They do not say that they were on private land or that they were trespassing or intended to trespass or that they knew, and they do not allege that there was no authority for them being on the place. There has been testimony here that this was the center of Monroe and Rutgers Streets, which is not private land. It is public land. It is not clear in my mind from all of the testimony, that anybody knows exactly where the defendants were. We have been given description where there were police horses erecting a barricade.

These defendants went directly out of the barricade; that there is a walk of three and a half feet before there was a barricade, which is approximately fifteen feet; and yet that the sidewalk began before the fence posts, and that these people were directly in front of the barricade and, at the same time, directly between the two fence posts, and I really think there isn't any idea on this record as to where they were. I don't think it has been proved exactly where they were. I don't believe it has been proved that they could have or did know where the project began and I don't think it's been proved that Monroe Street, the entrance to the project, was private land.

So that I believe, on all the evidence, there is a reasonable doubt that these people were, in fact, on the land which is one of the elements of trespass, and certainly I think there is absolutely no evidence that they had any intention of intruding on private land.

THE COURT: All right. Do you want to address yourself on the Disorderly Conduct?

MISS FINGERHOOD: Your Honor, on the Disorderly Conduct charge, there are three Court of Appeals cases in which people have been charged with violation of Subdivision 2 of Section 722 in which the Court of Appeals have held that unless there was evidence in the record that they annoyed and disturbed the public as a whole rather than the people directly involved in the incident, that they could not be found guilty of disorderly conduct.

I move to dismiss on the basis of all the evidence. I move for a verdict of Not Guilty on the ground that on all the evidence in this case, I believe there is a reasonable doubt due to the fact that this was a private disturbance. We have had no evidence here that anybody was involved except the people whom we have seen here, a City contractor working for a City which has this problem under advisement, which knew about this problem and was aware of it and considering it; the demonstrators who were trying to make stronger their point of this; the policemen

who had come upon the scene before these defendants in order to make sure that the situation was an orderly one. It was well known to everybody that there was going to be an attempt to make a visible and strong dramatic protest against a City policy, and the City officials were aware of this and, I believe, fairly sympathetic to it. The police had instructions to be very gentle and there was no possibility in this situation of there being a public disturbance. There is no testimony there was traffic on the street; there is no testimony there was confusion or excitement.

I plead under People vs Casen*, 8 New York 2d, 89d; People vs Nixon*, which is also a picketing case, 248 New York 182, and under People vs Carvel*, 3 New York 2d, 327.

THE COURT: Those are picketing cases?

MISS FINGERHOOD: Not all of them.

THE COURT: You said "also" picketing

*phonetic

case.

MISS FINGERHOOD: People vs Nixon* is also a picketing case. People vs Donegan* -- sorry, People vs Cardona is a picketing case.

THE COURT: You don't contend that was picketing.

MISS FINGERHOOD: No no, and People vs Caisan*, a case where a man kept running into a liquor store and shouting abusive language at the owner and the policeman told him not to go back and he went back, but the Court indicated that was a private incident in that the general public as a whole were not involved. It was something which was an argument in which the police were asking the man not to go back in and the liquor store owner personally was annoyed.

THE COURT: Have you finished your motion?

MISS FINGERHOOD: Yes.

THE COURT: Both motions are denied. Both defendants are found guilty of both charges.

*phonetic

Sentence today or tomorrow, or when do you want sentence?

MISS FINGERHOOD: Well, I would like to appeal the Misdemeanor, so I would like my forty-eight hours.

THE COURT: Forty-eight hours granted. The defendants will be finger-printed. The case is adjourned until Friday for sentence. Are they on bail or parole?

MISS FINGERHOOD: Parole.

THE COURT: Parole continued until Friday as to both. That's Part 2-A on the fourth floor.

****

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF MINUTES TAKEN IN THIS CASE BY ME.

Carol M. Wright

CAROL M. WRIGHT
Official Court Reporter

SEDFRE STATE OF NEW YORK VS. HARRINGTON, GLADYS & MARTINEZ, RAPHAEL, 1963

...ersity of Wisconsin

Please Retain Original Order

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Folder 22

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: FIRST DEPARTMENT

----------X

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

GLADYS HARRINGTON AND RAPHAEL MARTINEZ,

Defendant-Appellants

Notice of Motion

Docket Numbers: 7584,7585-'64

----------X

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Stephen M. Nagler, Esq., duly sworn to the 30th day of July, 1965, the undersigned will move this Court at a term thereof to be held at the Courthouse, 60 Centre Street in the City and County of New York on the 19th day of August, 1965 at 10 O'clock in the forenoon or as soon thereafter as counsel can be heard for an order vacating and setting aside the order dismissing the appeal of the above named Defendant-Appellants pursuant to Rule III (2) (c), Rules of the Appellate Term, First Department, (The order dismissing the within appeal was entered on July 13, 1964), and for a further order directing an enlargement of time in which to perfect the within appeal, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
July 30th, 1965

Yours etc.,

Stephen M. Nagler, Esq.
Attorney for Defendant-Appellants
Office & P. O. Address
c/o George Schiffer
40 E. 49th Street
New York, New York 10017

TO: Frank Hogan, Esq.
District Attorney, New York County
Office and P. O. Address
155 Leonard Street
New York, New York

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: FIRST DEPARTMENT

----------X

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

AFFIDAVIT

GLADYS HARRINGTON AND RAPHAEL MARTINEZ,

Defendant-Appellants

----------X

STATE OF NEW YORK)
SS,:
COUNTY OF NEW YORK)

STEPHEN M. NAGLER, ESQ. being duly sworn, deposes, and says:

1. I am an attorney for the Congress of Racial Equality and an associate of George Schiffer, Assistant General Counsel of that organization, and as such I am familiar with the facts in this case.

2. For the purposes of the above entitled matter, I am associated with Nathaniel Mitchell, Esq. who represented the above named defendants at their trail, before the Hon. Francis X. O'Brien, Judge of the Criminal Court of the City of New York, in the County of New York, on February 14th, 1964. The defendants were convicted of violating § 2036 of the Penal Law.

3. The failure to prosecute this appeal in due time is explained by the fact that counsel believed that this was one of several cases included in a stipulation entered into with the District Attorney of New York County to delay appeals pending a final determination in the cases of People v. Penn and/or People v. Lawson.

4. Certiorari in the case of People v. Penn is now being sought from the Supreme Court of the United States.

5. The case of People v. Lawson was decided by the Court of Appeals of the State of New York in June, 1965.

The Court of Appeals affirmed without opinion the decision of the Appellate Term, First Department dismissing the charge of violation of §§ 2036 of the Penal Law. People v. Lawson, 44 Misc. 2d, 578, 254 N.Y.S. 2d 300 (1964). The Appellate Term stated that §§ 2036 (unlawful intrusion) did not apply if a person entered premises lawfully, although he remained against the will of the owner.

6. In the present case, defendants entered a public building lawfully and remained after being asked to leave.

7. The conviction of the defendants for violation of § 2036 of the Penal Law was therefore an error and should be reversed.

8. No previous application has been made to this or any other court for the relief sought.

WHEREFORE your deponent prays that an order be granted setting aside the order dismissing the appeal herein pursuant to Rule III (2) (c), Rules of the Appellate Term, First Department and for a further order granting an extension of time in which to perfect the appeal.

Stephen M. Kayla

Sworn to before me
this 30 day of July 1965.

RITA L. CARRINGTON
NOTARY PUBLIC, State of New York
No. 41-0581325
Qualified in Queens County
Cert. filed in New York County
Term Expires March 30, 1967

December 10, 1965

Alan Leibowitz, Esq.
c/o Appeals Bureau
District Attorney of N. Y. County
155 Leonard Street
New York, New York

Dear Alan,

Please let me know as soon as possible if the enclosed is acceptable.

Cordially,

SMN:DF

Stephen M. Nagler

Dcw

December 10, 1965

PEOPLE v. GLADYS HARRINGTON & RAPHAEL MARTINEZ

DRAFT OF AGREED STATEMENT OF FACTS

Defendants entered the rental office of a private building lawfully, but refused to leave after being asked to do so by the proprietor. They were told that if they failed to leave they would be arrested. On their continued refusal, they were arrested and carried out of the building. They were arrested, and charged with violating Penal Law §§ 1851 and 2036.

AB-168-2M-702006(63) 114

NEW YORK SUPREME COURT

APPELLATE TERM —FIRST JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

GLADYS HARRINGTON and RAPHAEL MARTINEZ,

Defendant-Appellant.

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the argument of the appeal in the above-entitled action be adjourned to the 6TH day of DECEMBER 1965, subject to the approval of the Court.

Dated, New York, October 18, 1965.

Frank S. Hogan

District Attorney, New York County,
Attorney for Respondent.

Stephen McNaglen

Attorney for Appellant.

SUPREME COURT OF THE STATE OF NEW YORK
FIRST DEPARTMENT: APPELLATE TERM

.....X

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

-against-

GLADYS HARRINGTON, &
RAPHAEL MARTINEZ,
Defendants-Appellants.

.....X

STATEMENT IN LIEU OF RECORD ON APPEAL
PURSUANT TO CPLR RULE 5527

Pursuant to Rule 5527 of the CPLR, parties, believing that the questions presented by the appeal herein of the appellants from the judgment entered in the Criminal Court of the City of New York, County of New York, on February 14, 1964 can be determined by the Appellant Term of the Supreme Court of the State of New York, First Department, without an examination of all the proceedings in the Criminal Court of the City of New York, County of New York, present this agreed statement showing the questions arose and were decided in said Court, and setting forth only so much of the facts averred and proved as are necessary to a decision of such questions by said Appellate Court as follows:

1. FACTS

At about 6 A.M. defendants entered a partially constructed building at Elk and Duane Streets for the purpose of protesting discrimination against Negroes in employment in the building trades industry. They entered through an open entrance on a public street frequently used by pedestrians as a "shortcut". They were asked to leave by Gerald Loftus, an assistant superintendent for the Turner Construction Company, the general contractor on the construction site. When appellants refused to leave, Mr. Loftus

called the police. On their continued refusal to leave, appellants were arrested by Patrolman Joseph Gasparik, Shield No. 9421, of the Fifth Precinct. The appellants were tried before Hon. Francis X. O'Brien, Judge of the Criminal Court of the City of New York in Part 2B in the County of New York, and convicted on February 14, 1964 of violating §2036 of the Penal Law. Appellant Martinez was also convicted of violating §1851 of the Penal Law.

During their entire stay on the premises at Elk and Duane Sts., appellants remained peaceful. When appellant Martinez was notified that he had been arrested, he "went limp" and had to be carried to a waiting police vehicle.

2. ISSUES TO BE DETERMINED ON THIS APPEAL

A. May one who enters property lawfully, but refuses to leave when asked to do so by the owner or manager thereof, be charged with violating §2036 of the Penal Law?

B. Where there is no justified underlying arrest, can there be a conviction for violation of §1851 of the Penal Law?

Dated: New York, N.Y. _____, 1965

_____
Attorney for Defendants-Appellants

_____
District Attorney of New York County

The foregoing statement in lieu of a record on appeal is hereby approved this _____ day of _____, 1965.

_____
J. C. C.

SUBMITTED BY: STEPHEN M. NAGLER

SUPREME COURT OF THE STATE OF NEW YORK

FIRST DEPARTMENT: APPELLATE TERM

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-Against-

RAPHAEL MARTINEZ and GLADYS HARRINGTON,

Appellants,

BRIEF OF APPELLANTS

STEPHEN M. NAGLER, ESQ,

Office & P. O. Address
c/o CORE
38 Park Row
N.Y. N. Y. 10038

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PERSONS WHO ENTER PREMISES LAWFULLY MAY NOT BE CHARGED WITH VIOLATION OF § 2036 OF THE PENAL LAW, ALTHOUGH THEY REMAIN ON THE PREMISES AGAINST THE WILL OF THE PROPRIETER.
PEOPLE v LAWSON 44 MISC. 2D 578, 254, N.Y.S. 2ND 300 , (1964).
Affirmed, 16, N.Y. 2D 552 (1965).

Point 11----------Page 4

IF THE OTHER CHARGE FAILS, THE CHARGE OF VIOLATION OF § 1851 MUST, AS A MATTER OF LAW, BE DISMISSED.

Point 111----------Page 5

SECTION 1851 DOES NOT APPLY TO NON-VIOLENT, NON-COOPERATION WITH A PERSON'S OWN ARREST.

Point 1V----------Page 6

EVEN IF § 1851 is APPLICABLE, NON-VIOLENT, NON-COOPERTTION IS NOT "RESISTANCE"

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STATEMENT OF FACTS

Defendants entered a construction site at Elk and Duane Streets for the purpose of peacefully protesting discrimination against Negroes in the building trades industry. They refused to leave when subsequently asked to do so and were arrested. The Defendants "went limp"and failed to cooperate in their own arrest.

POINT 1

PERSONS WHO ENTER PREMISES LAWFULLY MAY NOT BE CHARGED WIGH VIOLATION OF § 2036 OF THE PENAL LAW, ALTHOUGH THEY REMAIN ON THE PREMISES AGAINST THE WILL OF THE PROPRIETER. PEOPLE v LAWSON 44 MiSC. 2D 578, 254, N.Y.S. 2ND 300, (1964), AFFIRMED, 16, N.Y. 2D 552 (1965).

In People v. Lawson, Supra, six defendants entered the complainant's real estate office, and remained after repeated requests that they leave. In reversing their conviction under Penal Law § 2036, the Appellate Term of the Supreme Court, First Department, said;

"In this court's opinion, § 2036, supra, in clear and unambiguous language, makes criminal only an unauthorized entry upon real property. It does not purport to make criminal a refusal to leave property which had been lawfully entered. (Emphasis supplied)

POINT 11

IF THE OTHER CHARGE FAILS, THE CHARGE OF VIOLATION OF § 1851 MUST, AS A MATTER OF LAW, BE DISMISSED.

A charge of violation of § 1851 of the Penal Law can not stand if there was no valid reason for making the arrest. Not only is one not required to cooperate with his own unlawful arrest, but, in fact, one may resist a wrongful attempt to arrest him. People v. Galuk, 11, Misc. 2d 961 (1958). In People v. Galamison, 42 Misc. 2d. 391 (1963), the court said:

> "If a defendant is charged both with disorderly conduct and resisting arrest, the latter charge must fall if he is acquitted on the former, because in such an event, defendan's original underlying arrest for disorderly conduct is deemed to have been unlawful, entitling him to use reasonable force to resist it". (At p. 393).

POINT III

SECTION 1851 DOES NOT APPLY TO NON-VIOLENT, NON_COOPERATION WITH A PERSON'S OWN ARREST.

Between 1879 when § 1851 was passed and 1962 there were no reported cases under § 1851 arising from a situation in which a person was charged with resisting his own arrest by a peace officer. There are several reasons for this. First of all, persons charged with resisting arrest have always been prosecuted under § 1825 of the Penal Law, which specifies that the person resisting must have used "force or violence".

Second, there was considerable doubt that the term "public officer" used in § 1851 included police officers. PEOPLE v. STEWARD, 54 N. Y. S. 348, 183 Misc. 212(1944).

In general, the statute was only applied in different types of situations. See PEOPLE v. RICHTER, 265 App Div 767, aff'd. 291 N. Y. 161; PEOPLE v. FIDLER, 280 App Div 698; and PEOPLE v. PAPP, 185 N. Y. S. 2d 907 (1959). Section 1825 was used in cases of forcible resistance to arrest. The very existence as well as the terms of that statute indicate the nature of the conduct which the legislature intended to proscribe. No authority exists which declares that "doing nothing" in an arrest situation is a crime under § 1851.

POINT 1V

EVEN IF § 1851 IS APPLICABLE, NON_VIOLENT, NON-COOPERTTION IS NOT "RESISTANCE"

As stated above there is no basis for a finding that non-violent, non-cooperation constitutes "resistance" or "obstruction" under the terms of § 1851, Both terms require some sort of affirmative conduct in the nature of force. PEOPLE v KNIGHT. 35 Misc. 2d 216 (1962); MOSES v. STATE, 6 Ga App. 251 (1109) : HARRISON v STATE 26 Ga App. 645 (1921): UNITED STATES v. LOSE, 63 F.951; STATE v WELCH 37 Wisc. 196 (1875): D.C. v LITTLE, 70S.Ct.468; REGINA v. DAGLY, 29 CR 55 (NS) (1958): REGINA v. SENENWICK: 14 WWK (NS) 523 (1955). Several unreported New York cases substantiate this view. In PEOPLE v. KELLY et. al, Mag. Ct., Brooklyn, March 30, 1962 charges under § 1851 were dismissed where defendants had merely "gone limp". There similar cases arising from demonstrations at the Downstate Medical Center in Brooklyn were dismissed in 1963 for the same reason. Indeed, one is under no duty to assist in his own arrest particularly where there are doubts as to the validity of the charges. In WRIGHT v. GEORGIA, 83 S. Ct. 1240 at 1245

(1963), the Supreme Court said;

> "(O)ne cannot be prosecuted for failing to obey the command of an officer if that command itself is violative of the constitution"

CONCLUSION

For the above reasons the charges of Violation of SS 1851 and 2036 of the Penal Law should be reversed and dismissed

Respectfully submitted,

Stephen M. Nagler, Esq.
c/o CORE
38 Park Row
New York, N. Y. 10038

SEDFI

NEW YORK vs. HUTCHISON, DAVID C., 1965-1966

State Historical Society of Wisconsin

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Pro. O Hutchinson

CITY COURT OF SYRACUSE

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JOHN D. MILLER

Defendant.

NOTICE OF APPEAL

SIR,

PLEASE TAKE NOTICE, that the above named defendant hereby appeals to the County Court of Onandaga County, from his conviction of violation of §2036 of the Penal Law and sentence of 30 days on the 29th day of October, 1965 in the City Court of the City of Syracuse,

AND said defendant appeals from each and every part of said convictions and all intermediate orders and sentences.

Dated: Syracuse, New York
November 1, 1965

Yours etc.,

FAITH A. SEIDENBERG,
Attorney for Defendant
Office & P. O. Address
217A State Tower Bldg.
Syracuse, New York

TO: Hon. Francis X. Moran, Esq.
District Attorney of
Onandaga County
Public Safety Building
Syracuse, New York

CITY COURT OF SYRACUSE

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

CAROL COSITORE & FRANK BRITTEN,

Defendants

NOTICE OF APPEAL

SIR,

PLEASE TAKE NOTICE, that the above named defendants hereby appeal to the County Court of Onandaga County, from their convictions of violation of §2036 of the Penal Law and sentences of 30 days for defendant Cositore and 90 days for defendant Britten, on the 27th day of October, 1965 in the City Court of the City of Syracuse,

AND said defendants appeal from each and every part of said convictions and all intermediate orders and sentences.

Dated: Syracuse, New York
November 1, 1965

Yours etc.,

FAITH A. SEIDENBERG,
Attorney for Defendants
Office & P. O. Address
217A State Tower Bldg.
Syracuse, New York

TO: Hon. Brancis X. Moran, Esq.
District Attorney
Onandaga County
Public Safety Building
Syracuse, New York

CITY COURT OF SYRACUSE

.....X

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

NOTICE OF APPEAL

LIZ MILLER, DONNA DRAKE, PAT STEEN

Defendant

.....X

SIR,

PLEASE TAKE NOTICE, that the above named defendants hereby appeal to the County Court of Onandaga County, from their convictions of violation of §§ 722 and 2036, of the Penal Law and sentences of $ 100, for defendants, Miller, Drake, and Steen on the 28th day of October, 1965, in the City Court of the City of Syracuse,

AND said defendants appeal from each and every part of said convictions and all intermediate orders and sentences.

Dated: Syracuse, New York
November 1, 1965

Yours etc.,

FAITH A. SEIDENBERG,
Attorney for Defendants
Office & P.O. Address
217A State Tower Bldg.
Syracuse, New York

TO:

Hon. Francis X. Moran, Esq.
District Attorney of
Onandaga County
Public Safety Building
Syracuse, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

DAVID CROCKETT HUTCHINSON, ROGER KNAPP, RONALD DAVIDSON, CHARLES C. GOLDSMITH, SUSAN TYLER, CAROL M. COSITORE, FRANK BRITTON, JR., ELIZABETH MILLER, DONNA DRAKE, PATRICIA STEEN, DAVID MILLER, EDDIE PETERSON, EDWIN DAY, ROBERT S. LUBETSKY, JOHN L. MCDOWELL, ROBERT L. TENNEY, PAUL D. LEONARD, BYRON FOX, IRWIN DEUTSCHER, CHARLES E. SPARKS, PHYLLIS JOHNSON, REV. EMORY PROCTOR, PATRICIA SANDRO, ESTELLA DELOACH, JAMES HOPE, LEROY WRIGHT, JOHN WILLIAMS, MARY ANN RUTLEDGE, LEON RUSSELL, MARILYN SAFIR, :

Defendant Petitioners. :

- x

MOTION FOR EXTENSION OF TIME TO FILE BRIEF

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavits of Faith A. Seidenberg sworn to December , 1965 and James D. Dougherty, sworn to December 3, 1965, the undersigned will move this Court at a regular session thereof for a motion to be heard in the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 13th day of December, 1965 at ten o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard for an order granting appellants to January 31, 1966 to file their brief.

Dated: New York, New York
December , 1965

Yours, etc.

James D. Dougherty
Attorney for Appellants

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

DAVID CROCKETT HUTCHINSON, ROGER KNAPP, : AFFIDAVIT
RONALD DAVIDSON, CHARLES C. GOLDSMITH,
SUSAN TYLER, CAROL M. COSITORE, FRANK :
BRITTON, JR., ELIZABETH MILLER, DONNA
DRAKE, PATRICIA STEEN, DAVID MILLER, :
EDDIE PETERSON, EDWIN DAY, ROBERT S.
LUBETSKY, JOHN L. MCDOWELL, ROBERT L. :
TENNEY, PAUL D. LEONARD, BYRON FOX,
IRWIN DEUTSCHER, CHARLES E. SPARKS, :
PHYLLIS JOHNSON, REV. EMORY PROCTOR,
PATRICIA SANDRO, ESTELLA DELOACH, :
JAMES HOPE, LEROY WRIGHT, JOHN
WILLIAMS, MARY ANN RUTLEDGE, LEON :
RUSSELL, MARILYN SAFIR,

:

Defendant Petitioners.
- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES D. DOUGHERTY, being duly sworn, deposes and says:

That he is an attorney admitted to practice in the Courts of the State of New York, in the United States District Court, Southern District of New York and in this Court.

That he makes this statement in support of a motion by appellants for an order extending the time to file the brief of appellants to January 31, 1966.

That on October 21, 1965 he agreed at the request of CORE to prepare, on a voluntary basis, the appeal by appellants to this Court from the action of the United States District Court, Northern District of

New York, granting respondent's motion to remand the action to the criminal courts of the State of New York.

That he is engaged full time in the practice of law as an associate with a firm in New York City and can only undertake the preparation of the appeal to this Court in his free time; that on or about October 26, 1965 he was served with a notice of motion to dismiss a pleading in a very substantial litigation and has been engaged in the preparation of the brief, in opposition since that time; that in preparing this brief and in continuing to do his other legal work he has found it necessary during the past six weeks to work a majority of the weekday evenings, most Saturdays and several Sundays; that he therefore has not had sufficient time to prepare the appeal to this Court; that his estimate is that the brief and other papers in opposition to the motion on which he presently is working will not be ready for service prior to December 15th; that CORE has been informed of the above facts and has informed him that they still desire to have him prepare the appeal.

That on December 2, 1965 he spoke with Mr. Gerber, on information and belief an Assistant District Attorney for the City of Syracuse, and Lucian Ali, on information and belief the Assistant District Attorney for the City of Syracuse in charge of appeals; that he was informed by Mr. Gerber that Mr. Ali possessed the authority to grant or deny his request for additional time; that he disclosed the foregoing facts to Mr. Ali and asked Mr. Ali to enter into a stipulation with him giving appellants further time to file a brief; that Mr. Ali refused to enter into any stipulation granting appellants any additional amount of time to file a brief.

That the issues of law which are the subject of this appeal are quite complex and the preparation of a brief analyzing these issues and presenting appellants' position as to them will take a very substantial amount of time.

That by reason of his current professional commitments and the complex legal issues involved in this appeal, he believes that he would be best able to file an adequate brief if he were given to January 31, 1966 to do so and respectfully requests this Court to grant appellants' motion for an order granting such additional time.

James D Daughty

Sworn to before me
this 3rd day of
December, 1965.

Harris J. Amhowitz

HARRIS J. AMHOWITZ
Notary Public, State of New York
No. 31-5068310
Qualified in New York County
Commission Expires March 30, 1966

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

- vs - :

DAVID CROCKETT HUTCHINSON, ROGER KNAPP, RONALD DAVIDSON, CHARLES C. GOLDSMITH, SUSAN TYLER, CAROL M. COSITORE, FRANK BRITTON, JR., ELIZABETH MILLER, DONNA DRAKE, PATRICIA STEEN, DAVID MILLER, EDDIE PETERSON, EDWIN DAY, ROBERT S. LUBETSKY, JOHN L. MCDOWELL, ROBERT L. TENNEY, PAUL D. LEONARD, BYRON FOX, IRWIN DEUTSCHER, CHARLES E. SPARKS, PHYLLIS JOHNSON, REV. EMORY PROCTOR, PATRICIA SANDRO, ESTELLA DELOACH, JAMES HOPE, LEROY WRIGHT, JOHN WILLIAMS, MARY ANN RUTLEDGE, LEON RUSSELL, MARILYN SAFIR, : **AFFIDAVIT**

Defendant Appellants. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF ONONDAGA)

FAITH A. SEIDENBERG, being duly sworn, deposes and says:

That she is an attorney admitted to practice in the courts of the State of New York and in the United States District Court, Northern District of New York.

That she makes this statement in support of a motion for an order extending the time to file the brief of appellants to January 31, 1966.

That she is the attorney of record for the appellants herein and has been their attorney in the various proceedings in the state and federal courts which have taken place up to this time.

That a petition for the removal of the actions which are the subject of this appeal from the state

criminal courts in Syracuse, New York to the United States District Court, Northern District of New York under 28 U.S.C. § 1443, was filed on June 7, 1965;

That the United States District Court, Northern District of New York entered an order on August 27, 1965, remanding the actions which are the subject of this appeal to the state criminal courts;

That a Notice of Appeal from the order of the United States District Court, Northern District of New York, remanding the actions to the state criminal courts was filed with the clerk of this Court on August 30, 1965 and that the record on appeal was filed on September 7, 1965; that the time to file appellants' brief expired on October 7, 1965;

That a request for a stay of all state criminal proceedings pending the outcome of this appeal was made to this Court on September 7, 1965 and was denied on September 13, 1965.

That by reason of the above facts and particularly the denial of the stay, she was engaged from shortly after September 13, 1965 through October, 1965 in defending appellants herein in numerous trials in the state criminal courts in Syracuse; that such defense has been extremely burdensome and occupied all her time during such period including many nights and weekends; that she was unable to devote any substantial amount of time to preparation of the appeal to this Court and submitted the notes and results of her research and work on the appeal to CORE in October

1965 and informed CORE that she would be unable to work further on it.

Faith A Sinclair

Sworn to before me
this 6th day of
December, 1965.

William J Oley

WILLIAM J. OLEY
Notary Public, In the State of New York
Qualified in Crem. Co. No. 24-6215201
My Commission Expires March 30, 1966

January 20]

COUNTY COURT
COUNTY OF ONONDAGA : STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

Appeal

- vs -

DAVID MILLER,

Appellant.

BRIEF OF APPELLANT

Introductory Statement

Defendant appeals from a decision of the City Court of the City of Syracuse, State of New York, Hon. Robert V. O'Hara presiding, convicting him of violating § 2036 of the Penal Law, in that he did "intrude in a structure, to wit, the main lobby of the Niagara Mohawk Corporation, at 101 North Franklin Street in the City of Syracuse, New York." The defendant was adjudged guilty after trial on October 29, 1965 and sentenced to thirty days in the penitentiary.

Statement of Facts

The Niagara Mohawk Power Corporation is a public utility which maintains an office building located at the intersection of North Franklin St. and Erie Blvd., West, in Syracuse, New York. The building is open to the general public. (p.18)

On March 19, 1965, the defendant, David Miller at or about 2:00 p.m. entered the building by a service entrance

and took an elevator operated by Clovis J. Connell to the public customers' service lobby, an area then occupied by various members of the general public and various employees of Niagara Mohawk, (p. 21).

At about 2:20 p.m., the company's assistant security officer, Herbert Blaisdell, approached the defendant to ask him his business with the company. The defendant did not reply. Mr. Blaisdell did not ask the defendant to leave, although he remained in the lobby and could have done so at any time.

The defendant, at about 2:20 p.m., took out a sign which stated, "Niagara Mohawk should take affirmative action for integrated work force", and walked in a circle in the public customers' lobby with the sign, (p. 20). The defendant remained mute and did not interfere in any way with any of the other customers or employees in the lobby.

At about 2:40 p.m., Mr. Blaisdell requested the defendant to leave. The defendant said nothing and continued to walk about the public lobby with his sign until approximately 3:50 p.m. During most of this period, uniformed members of the Syracuse Police Department were also present in the lobby, (p. 27). At about 3:50 p.m., these officers arrested the defendant. At this time the record shows that the building was open to the public and that, in fact, the public was present.

SUMMARY OF ARGUMENT

POINT I THE PROVISION AGAINST UNLAWFUL INTRUSION WAS MEANT ONLY TO APPLY IN SITUATIONS IN WHICH THE RIGHTFUL OWNER OR POSSESSOR IS DEPRIVED OF THE POSSESSION OF HIS PROPERTY. CONSEQUENTLY, IT IS INAPPLICABLE IN THE CASE OF A CLEARLY TEMPORARY ENTRY WHOSE PURPOSE IS TO EXERCISE CONSTITUTIONAL RIGHTS, AND WHERE THERE IS NO

TAKING OF POSSESSION AND NO INTENT TO TAKE POSSESSION.

POINT II — § 2036 REQUIRES AN ENTRY UNLAWFUL FROM THE BEGINNING, AND THIS THE PEOPLE FAILED TO PROVE.

POINT III — AS A FRANCHISED PUBLIC UTILITY, NIAGARA MOHAWK PARTAKES OF THE CHARACTER OF QUASI-PUBLIC ACTIVITIES. CONSEQUENTLY, FIRST AMENDMENT RIGHTS ARE APPLICABLE AND OCCUPY A PREFERENTIAL POSITION.

POINT I

THE PROVISION AGAINST UNLAWFUL INTRUSION WAS MEANT ONLY TO APPLY IN SITUATIONS IN WHICH THE RIGHTFUL OWNER OR POSSESSOR IS DEPRIVED OF THE POSSESSION OF HIS PROPERTY. CONSEQUENTLY IT IS INAPPLICABLE IN THE CASE OF A CLEARLY TEMPORARY ENTRY WHOSE PURPOSE IS TO EXERCISE CONSTITUTIONAL RIGHTS, AND WHERE THERE IS NO TAKING OF POSSESSION AND NO INTENT TO TAKE POSSESSION.

§ 2036 of the Penal Law states that,

> "A person who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof, or who erects or occupies thereon any hut, or other structure whatever without such authority; and a person who places, erects, or occupies within the bounds of any street or avenue of a city or village, any hut, or other structure, without lawful authority, is guilty of a misdemeanor."

Sec. 2036 of the Penal Law is derived from L. 1857 ch 396 § 1 and § 467 of the Penal Code of 1881. The original statute, c. 396 reads:

> "any person who shall hereafter intrude or squat upon any lot or piece of land...etc."

The word "squat" was omitted in sec. 467 of the Penal Code and the provision as it exists today was then enacted.

Intrusion at common law always required a taking of possession. Co Lit 277(a) (2d Ed. 1629). The English statute for informations on intrusion (21 Jac. 1 c.14 (1623-4) was an action by the Crown to recover possession in the second of those

situations. The defendant was allowed to retain the possession he had at the time of the information until the title was tried and found for the King.

In Boyland v. Deinzer 18 A. 119 (1889) an intruder is again defined as one who takes wrongful possession of lands.

A mere temporary entry is not an intrusion. Since 2036 is a criminal statute, a criminal intent must be shown for prosecution. Hewitt v. Newburger, 141 N.Y. 538 (1894); People v. Barton 232 NYS 2d 75. In people v. Stevens, 109 N.Y. 159, the trial court charged the jury there could be no conviction of unlawful intrusion unless defendant entered with "the intent and purpose of unlawfully depriving the owner of the possession of the property." Thus, in order to convict under 2036 an intent to take possession without right must be proven.

The interpretation of the statute, in People v. Stevens, Supra, was adopted by the Revisers of the Penal Law. Title 1 § 145.05. There simply is no criminal trespass statute in New York.

There is certainly no evidence in the record supporting the notion that the defendant intended to take possession of the building. Such intent could not be inferred from the act of walking about the public lobby. Defendant did nothing which could be construed as attempting to oust the complainant, its security officers or the Syracuse Police Officers from the building. His purpose was clear: To execute his First Amendment right to call attention to the inequities in the hiring practices of Niagara Mohawk Corporation by picketing, (p. 25). This negates any possible notion of intent to take possession, cf. People v. Collins 44 Misc. 2d 430, aff'd, 16 N.Y. 2d 554.

Therefore, defendant could not be guilty of § 2036 of the Penal Law, as it is clear that defendant did not intend to take possession of the premises.

POINT II

§ 2036 REQUIRES AN ENTRY UNLAWFUL FROM THE BEGINNING, AND THIS THE PEOPLE FAILED TO PROVE.

The chief element of proof required to establish a violation of Section 2036 is that the defendant committed an unlawful entry.

In a similar case, People v. Lawson 44 Misc. 2d 578, 254 N.Y.S. 2d 300 aff'd 16 N.Y. 2d 552, 208 N.E. 2d 466, the Court of Appeals reversed convictions under Section 2036 because, although the defendants refused to leave private premises when requested, their entry had not been unlawful. The Appellate Division stated that:

> "Section 2036 in clear and unambiguous language makes criminal only an unauthorized entry upon real property." 44 Misc. 578, 580, 254 N.Y.S. 2d 300, 302 (1964)

The Appellate Term further stated, with reference to refusal to leave private property lawfully entered:

> "No case has been called to the Court's attention, or discovered by independent research, which actually holds that the Section 2036 covers such a situation." (Id.)

The mere presence of someone with a sign on private property open to the public does not appear to be any crime under the laws of New York, much less a violation of Section 2036. People v. Prinz, 64 Civ. 1666 (1964). See also People v. Collins, Supra.

The defendant entered the building through a service entrance. He was reported by the elevator operator who agreed, on cross-examination, that if he saw any pickets he was to notify his superior, and it would not make any difference why the picket was there, (p.18). He was arrested in the customers' service lobby (p.28), a place ordinarily occupied by members of the general public, (p. 21,30). He was questioned by the was

not asked to leave for some period of time after he had entered the lobby, (p.18, 20). Entering a public place without more is plainly lawful.

We are dealing here with events that transpired in the customers' service lobby. The record does not contain any testimony that the lobby was closed to the public although there were "security guards" on some of the doors. Rather, the record shows that throughout the period in question, members of the public entered and exited from the lobby, (p. 21, 30).

On the record therefore, the defendant was not arrested for making an entry nor can his entry be deemed to be unlawful or unauthorized. Having made a lawful entry, he could not be convicted of a crime under Section 2036. People v. Lawson, Supra, People v. Collins, Supra.

POINT III

AS A FRANCHISED PUBLIC UTILITY, NIAGARA MOHAWK PARTAKES OF THE CHARACTER OF QUASI-PUBLIC ACTIVITIES. CONSEQUENTLY, FIRST AMENDMENT RIGHTS ARE APPLICABLE AND OCCUPY A PREFERENTIAL POSITION.

As a franchised public utility, the Niagara Mohawk Power Co. is regulated by the Public Service Commission of New York under the Public Service Law. Article 4 of that law subjects Gas and Electric Corporations, such as Niagara Mohawk to numerous stringent regulations. Section 68 in particular requires Commission approval for the exercise of any right or privilege under any franchise and for construction of any facility. Niagara Mohawk's property is thus quasi-public and sufficiently affected with a public interest to justify application of constitutional safeguards to members of the general public who enter. Burton v. Wilmington Parking Authority 365 U.S. 715 (1961), Marsh v. Alabama, 326 U.S. 501 (1946). Para-

phrasing the words of Judge Tyler in Farmer v. Moses 232 F. Supp. 154 (S.D.N.Y.) holding the World's Fair to a similar standard, it would be incorrect to argue or conclude that Niagara Mohawk is a completely private venture, even if it is operated by a private corporation.

In People v. Barisi 193 Misc. 934, 86 N.Y.S. 2d 277 (City Magistrate's Ct. of N.Y., Manhattan, 1948), the right to picket was held to be constitutionally protected free speech, which could be exercised on private property under certain circumstances.

The Supreme Court has repeatedly held that on such property, constitutionally protected free speech takes precedence over criminal trespass statutes, and even more so Section 2036, an intrusion statute, as it is sought to be applied where public or quasi-public premises are involved.

As stated by the Supreme Court in Marsh v. Alabama, Supra:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."326 U.S. 501, 506.

> " "When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of the press and religion, as we must here, we remain mindful of the fact that the latter occupy a privileged position." (Id at 509).

Recent cases, involving breach of the peace statutes, have reaffirmed the special protection given to free speech. Cox v. Louisiana 85 S. Ct. 453,; Edwards v. South Carolina,

372 U. S. 229. Therefore, defendant's conviction could not be upheld on these grounds.

CONCLUSION

THEREFORE, the conviction of the defendant should be reversed.

Dated: , 1966
Syracuse, New York

Respectfully submitted,

FAITH A. SEIDENBERG, ESQ.
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217-A State Tower Bldg.
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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PEOPLE OF THE STATE OF NEW YORK

AGAINST , RESPONDENT

ELIZABETH MILLER, Defendant-Appellant.

AFFIDAVIT

STATE OF NEW YORK

COUNTY OF Kings, SS,

ELIZABETH MILLER, being duly sworn, deposes and says:

1. I am one of the persons who was arrested a Civil Rights demonstration at the Niagara-Mohawk Power Company plant on or abo t the 15th day of March, 1965.

2. I was arrested and charged with violating Penal Law § 722 (disorderly conduct) and § 2036 (unlawful intrusion).

3. I was arraigned on the following day.

4. At the arraignment bail was fixed at $20.00 on each charge, although no investigation was made respecting my allegation that I was and am a responsible member of the community.

5. The bail set, I believe, was not set to insure my appearance in court at a later date, but as the Assistant District Attorney stated in effect, but in order to prevent further disturbances at the Niagara-Mohawk Power Company plant.

6. I now reside and have resided at 2119 East Fayette Street, Syracuse, New York, for the past eight (8) years and in Syracuse for eighteen (18) years.

7. I am presently attending Onondaga Community College as a full-time student. At the time of my arrest I was a senior at Nottingham High School, Syracuse. Also at that time I was planning to be, and was accepted, to attend Onondaga Community College.

8. I am now living with my mother, Julia Miller, and my sister, Joanne Miller, at the above-mentioned address.

Elizabeth Miller

Sworn to before me this

28 day of JANUARY 1966.

Richard D Specter

RICHARD D. SPECTER
Notary Public, State of New York
No. 24-9119435
Qualified in Kings County
Commission Expires March 30, 1956

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

AGAINST

ELIZABETH MILLER,
Defendant-Appellant.

AFFIDAVIT

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

AGAINST

ELIZABETH MILLER, Defendant-Appellant.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

AGAINST

ELIZABETH MILLER,
Defendant-Appellant.

AFFIDAVIT

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Rec'd Hulslander

COUNTY COURT - ONONDAGA COUNTY
APPELLATE TERM : DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ROGER KNAPP,

Defendant-Appellant.

---------- X

BRIEF OF DEFENDANT-APPELLANT

Introductory Statement

Defendant appeals from a decision of the City Court (Criminal Division-Police) of the City of Syracuse, State of New York, Hon. Robert V. O'Hara, presiding, convicting him of wilfully resisting, delaying or obstructing a public officer in the discharge of his duty, in violation of Section 1851 of the Penal Law. The case was tried on November 1, 1965 before Judge O'Hara, and defendant was adjudged guilty after trial on the same day and sentenced to thirty days in the Onondaga County Penitentiary. An opinion was orally rendered by Judge O'Hara when he rendered the verdict, which is part of the record (T-p.119, 120).

Statement of Facts

The defendant is a graduate student at Syracuse University and an instructor at University College. He is a member of the Congress of Racial Equality, hereafter referred to as CORE. On April 8, 1965, three members of CORE, (not including the defendant) staged a protest demonstration in front of the Niagara Mohawk Building in the City of Syracuse. In connection with this protest, three automobiles had been parked in the entrance of the

parking lot of the Niagara Mohawk Company and the three CORE members had chained themselves to the cars and were lying underneath the automobiles. The defendant was present at that location at the time of these demonstrations but he did not participate in them. Two days later defendant was arrested and charged with a violation of Section 1851 in that he allegedly wilfully resisted, delayed or obstructed a public officer in the discharge of his duty. To prove this alleged violation, the people produced four witnesses, to wit: (a) Sergeant James Longo, the police officer in charge and the police officer who was allegedly wilfully resisted, delayed and obstructed in the discharge of his duty; (b) Frank Sardino, another police officer; (c) John C. Marshall; and (d) Vincent Shurant.

The testimony of these four witnesses was substantially identical. All of them had arrived at the scene of the demonstrations on April 8, 1965 at approximately 7:30 A.M. or shortly thereafter. They had observed the three parked cars in front of the parking lot and the three CORE members who had chained themselves underneath them, and they had observed the defendant who was standing near the cars. All of the witnesses testified that Sergeant Longo talked with the defendant three or four times and on these occasions asked the defendant to go to the curb. Several of the witnesses overheard a conversation or part of a conversation that took place between Sergeant Longo and the defendant. Mr. Marshall testified that Sergeant Longo asked the defendant whether he had keys to the locks (T-p.6). Police officer Frank Sardino testified that on one occasion he saw the defendant approach Sergeant Longo and ask him what he was going to do, and that a little later he overheard a conversation in which the defendant asked Sergeant Longo whether he would permit him to talk to the people under the cars, stating: "I think we have made our point clear. If you will let me talk to the people under the cars, we can clear up the situation" (T-p.23). Sergeant Longo testified that when he first arrived at the scene, the defendant

approached him, identified himself as the spokesman for the group (T-p.29), and asked him whether he was the police officer in charge, and after the witness had answered in the affirmative, advised him of the fact that the persons under the cars were chained to the cars in such a way that they might be injured or killed if the cars were moved (T-p.30). He further testified that later that morning, when he was discussing the problem of removing the persons from the cars with the operator from a tow truck agency, the defendant approached him and asked him what he was going to do and that he told him that they would jack up the cars and remove the people (T-p.31). All of the witnesses testified that Sergeant Longo asked the defendant 3 or four times to go to the curb, and that at these occasions the defendant went toward the curb.

All of the witnesses testified that many persons had gathered at the scene of the demonstration. Some testified that the people were quiet and orderly (T-p.12, 19) and some testified that they were noisy (T-p.26). They testified that several firemen and 6 to eight policemen arrived at the scene who helped to jack up the cars and to remove the people from under the cars, and that the CORE members who had chained themselves under the cars were arrested and taken away in paddy wagons.

No evidence was presented to show that the defendant in any way or manner interfered with the duties or activities of police sergeant Longo. The only evidence bearing on the issue of interference or hindrance was a statement by Sergeant Longo who testified, "Just prior to the time that the men were being moved from under the cars, the defendant came over and tapped me on the shoulder and took my attention from the activities at that time" (T-p.31), and upon the direct question by the prosecution whether defendant did "interfere with your operations in the performance of your duties as a police officer", he answered: "He did" (T-p.32), without elaborating in any way or showing how defendant interfered.

On cross-examination, Sergeant Longo testified that he did not arrest the defendant, nor did he ask for the arrest of the defendant, and that he found out only later that the defendant had been arrested for his conduct that morning (T-p.35).

SUMMARY OF ARGUMENT

POINT I. THE PEOPLE FAILED TO SHOW THE DEFENDANT WILFULLY RESISTED, DELAYED OR OBSTRUCTED A PUBLIC OFFICER FROM THE DISCHARGE OF HIS DUTY.

POINT II. MERE DISOBEDIENCE OF A POLICE OFFICER'S ORDER DOES NOT CONSTITUTE VIOLATION OF SECTION 1851 UNLESS THERE WAS SEPARATE STATUTORY DUTY TO COMPLY WITH HIS ORDER.

POINT III. IF SECTION 1851 WERE TO BE INTERPRETED SO AS TO PROHIBIT ANY FORM OF DISOBEDIENCE TO THE ORDERS OF A POLICE OFFICER, IT WOULD BE SO VAGUE AS TO AFFORD NO ASCERTAINABLE STANDARD OF GUILT AND WOULD BE UNCONSTITUTIONAL.

POINT I

THE PEOPLE FAILED TO SHOW THE DEFENDANT WILFULLY RESISTED, DELAYED OR OBSTRUCTED A PUBLIC OFFICER FROM THE DISCHARGE OF HIS DUTY.

Section 1851 makes it a misdemeanor for a person to wilfully resist, delay or otherwise obstruct a public officer in the discharge of his duty. Like every penal statute, Section 1851 has to be strictly construed and the State has the burden to show that the defendant has committed the acts prohibited by the law. In other words, in the present instance the State has the duty to show that the defendant has committed acts which show that he intentionally resisted, delayed or in any other way obstructed a police officer. A review of the evidence shows that no such facts were shown. What was shown was that the defendant was concerned with the safety of three men who had chained themselves underneath cars. That he expressed his concern to the police officer and discussed with him the manner in which the people were chained to the cars, and asked him what means he intended to use to extricate the people. There is no evidence that he ever raised

his voice. There is no evidence that he ever made any forceful gesture. There is no evidence that he tried to hinder the police officer or his agents to do anything that they wanted to do. The only evidence that was presented and on the basis of which the defendant was convicted was that he talked to the police officer and that he did not "stay on the curb" when told to stay there. Certainly this behavior does not show any kind of willful resistance, obstruction or hindrance. In order to resist,a person has to use some kind of force. Bouvier's Law Dictionary (3rd Rev.) defines "resist" as follows:

> "To oppose, by direct active and quasi-forcible means. The word is derived from the Latin, its etymological meaning being to stand against or to withstand. It is the opposition of force to force *** There must be actual opposition or resistance, making necessary under the circumstances, the use of force."

The Oxford English Dictionary, (Oxford, 1933) defines the word as follows:

> "To stop or hinder, to succeed in standing against *** an attack, invasion, blow or hostile action, to prevent, to repel."

Webster's Third New International Dictionary defines "resist" as:

> "To withstand the force or effect of; be able to repel or ward off; to exert oneself to counteract or defeat; strive against."

The peaceful asking of a question, the peaceful standing in any place can certainly not be interpreted as "resistance" as defined above. In order to resist a person, some kind of affirmative action must be taken.

Neither can it be said that the defendant in any way obstructed the efforts of the police officer.

"Obstruct" has been defined by Webster as

> "To block up, stop up or close up; place any obstacle in or fill with obstacles or impediments to passing; to be or come in the way of; hinder from passing, action, or operation."

Bouvier does not include the word "obstruct", but under "Obstruction of Justice", it states:

> "An act by which one or more persons attempts to prevent or does prevent the execution of lawful process *** The officer must be prevented by actual violence, or by threatened violence accompanied by the exercise of force."

The defendant's action can hardly be said to have "blocked up" or "stopped up" the actions of the police officer. Neither can it be said by any stretch of imagination that the defendant placed any obstacles or impediments in the way of the police officer. Nothing he did prevented the execution of lawful process and he certainly did not threaten violence or exercise any kind of force.

Since it cannot possibly be claimed that the defendant "resisted" or "obstructed" the police officer, the only question that remains is whether the defendant was guilty of "wilfully delaying" the officer in the exercise of his duties. Webster defines "delay" as

> "To put off, prolong the time of or before; to stop, detain or hinder for a time *** Delay implies a holding back as by interference."

Can it be said that the defendant delayed the police officer in his duties? To a certain extent, of course, anybody who asks a police officer any question will delay him to a certain degree. It would be ridiculous, however, to assume that any person who asks a question of a police officer or who makes a remark to him would be guilty of violation of Section 1851. The delay within the meaning of the statute must be a "willful delay"; an intentional act done for the purpose of detaining the officer from doing his duty. Section 1851 does not say that a person who delays an officer in the discharge of his duty is guilty of a misdemeanor, but only that a person who <u>wilfully</u> delays the officer in the discharge of his duty is guilty of a misdemeanor. The crime is in the intent of the party to retard

the actions of the officer. An act which incidentally delays the officer was never covered by Section 1851. In Screws v. United States, 325 U.S. 91 (1944), the Supreme Court discussed the meaning of the word "willful" when used in criminal statutes; on page 101 it stated:

> "We recently pointed out that 'willful' is a word 'of many meanings', its construction often being influenced by its context" *** The word denotes an act which is intentional rather than accidental *** When used in a criminal statute it generally means an act done with a bad purpose*** In that event something more is required than the doing of the act prescribed by the statute *** and evil motives to accomplish that which the statute condemns becomes a constituent element of the crime, Spurr v. United States, Supra (174 U.S. p. 734, 43 L.ed. 1152, 19 S. Ct. p.12); United States v. Murdock, Supra (290 U.S. p. 395, 78 L. ed. 385, 54 S. Ct. 223." (Emphasis supplied).

Nothing in the evidence presented by the people shows even a scintilla of evidence that the defendant's acts were done for the purpose of delaying the police officer in the exercise of his duties. On the contrary, the evidence only showed that he was concerned with the safety of the people. He was concerned with preventing any injury or harm to the men and actually assisted the police officer by telling him the manner in which the men had chained themselves under the cars.

POINT II

MERE DISOBEDIENCE OF A POLICE OFFICER'S ORDER DOES NOT CONSTITUTE VIOLATION OF SECTION 1851 UNLESS THERE WAS SEPARATE STATUTORY DUTY TO COMPLY WITH HIS ORDER.

In the opinion which Judge O'Hara gave when he rendered the verdict against the defendant, he emphasized that officer Longo requested the defendant at least three times to remove himself to the curb away from the area of disturbance. As a matter of fact, the opinion shows that the verdict was based exclusively on defendant's failure to go to the curb or to stay at the curb when the police officer requested him to do so (T-p. 119, 120).

The courts have held that there is a difference between the duty of a person to obey an officer who is directing traffic and the duty of not to obstruct a public officer. The duty to obey an officer directing traffic is imposed upon every person by the laws and regulations of the Vehicle and Traffic Law, whereas there are no laws that make it a duty to obey a public officer under other circumstances.

Accordingly, in People v. Fidler, 280 App.Div. 698, 117 N.Y. S.2d 313 (1952), the Court said that there is a difference between a person who is indicted under Section 1851 and one who is indicted under the Traffic Law:

> "The question was not one of 'disobeying a traffic officer under Vehicle and Traffic Law 88, S.2d 6, which deals with the refusal to comply with a reasonable order of a policeman in the regulation of traffic'. Defendants were under no duty to obey; their duty was not to obstruct the public officer; they were not being given a traffic order."

The same distinction was also made by the United States Supreme Court in its recent decision of Fred L. Shuttlesworth v. City of Birmingham, __U.S.__ (decided November 15, 1965), infra; and in State v. Welch, 37 Wisc. 196 (1875) where defendant refused to obey the orders of a policeman and instead chased away horses which the officer was supposed to replevy. The court held:

> "To bring a case within the statute, it is not enough that the execution of process is opposed or interrupted or hindered or prevented; the officer must be resisted *** And the resistance must be active and direct towards him."
> 37 Wisc. at 201.

In the present instance no traffic law was involved. The only law that was involved and the only law under which the defendant was indicted was Section 1851, which does not require that a person obey a police officer's orders, but only that a person does not actively, wilfully and intentionally hinder a police officer in his duties.

POINT III

IF SECTION 1851 WERE TO BE INTERPRETED SO AS TO PROHIBIT ANY FORM OF DISOBEDIENCE TO THE ORDERS OF A POLICE OFFICER, IT WOULD BE SO VAGUE AS TO AFFORD NO ASCERTAINABLE STANDARD OF GUILT AND WOULD BE UNCONSTITUTIONAL.

Section 1851 was clearly intended to apply to willful and intentional acts of a person designed to obstruct and interfere with the duties of a police officer. In a case where a person used physical force or violence to prevent a police officer from removing obstructions in the road, the statute was properly applied, Kline v. Hibbard, 29 N.Y. Sup. 807. However, if the statute were to be interpreted in such a broad and general manner as to include any act of disobedience or any act which incidentally delays a police officer, the statute would lack any ascertainable standard of guilt and would therefore be unconstitutional in accordance with the ruling in Screws v. United States, 325 U.S. 91 (1944) where the United States Supreme Court held, on page 103:

> "The constitutional requirement that a criminal statute be definite serves a high function. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition. This requirement is met when a statute prohibits only 'willful acts' in the sense we have explained. One who does act with such specific intent is aware that what he does is precisely that which the statute forbids. He is under no necessity of guessing whether the statute applies to him."

Following this ruling, the United States Supreme Court held only recently that the interpretation of a statute, which is so broad that it would make a person subject to the whim of a police officer, is unconstitutional. In Shuttlesworth v. City of Birmingham, __ U.S. __ (decided November 15, 1965), reported in the New York Law Journal of December 6, 1965, the defendants were convicted of two ordinances, one of which made it "unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on". Shuttlesworth was standing on the sidewalk with ten or

twelve companions outside the department store in the City of Birmingham. The police officer requested the defendant and his companions to clear the sidewalk and not obstruct it for the pedestrians. The defendant Shuttlesworth questioned the order, and after several requests asked the police officer, "You mean to say we can't stand here on the sidewalk?" After he refused to move, he was arrested and charged under the above ordinance. The Court held,

> "Literally read, therefore, the second part of this ordinance says that a person can stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat'. (Cox v. Louisiana, 379 U.S. 536, 579, separate opinion of Mr. Justice Black). Instinct with its ever present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state."

In the present case the statute does not make it a crime for a person to stand in the street or on the sidewalk after having been requested by a police officer to move on. Yet, the Court interpreted Section 1851 as if it did precisely that. The opinion emphasizes twice that the police officer had told the defendant "three times" to go to the curb. No other act of the defendant seems to have influenced the decision. He was convicted merely for standing at one place when the officer had told him to stand at another place. If this conviction were to be upheld, a person could be made subject to the whim of any police officer, the very thing which the Supreme Court in the Shuttlesworth case declared unconstitutional.

Conclusion

The ~~decision~~ conviction of the City Court should be reversed ~~since the People failed to prove that the defendant either "wilfully resorted" or "wilfully delayed" or "wilfully obstructed" a police officer.~~

Respectfully submitted,

Eleonore Beth
of counsel.

STATEMENT OF FACTS

David Miller per s. Tolleson

The Niagara Mohawk Power Corporation maintains an office building located at the intereection of North Franklin and Erie Blvd. West in Syracuse, New York. The building is open to the general public. (R18)

On March 19, 1965, the defendant, David Miller at or about 2:00/P.M. entered the building (R-14), and took an elevator operated by Clovis J. Connell to the public customers service lobby (R-16), an area then occupied by various members of the general public (R-21,29,30) and various employees of Niagara Mohawk.

At about 2:20 P.M., the company's assistant security officer, Herbert Blaisdell approached the defendant to ask him his business with the company. (R-19) The defendant did not reply. (R-19) Blaisdell did not ask the defendant to leave. Blaisdell remained in the lobby.

The defendant at about 2:20 P.M. took out a sign which stated, "Niagara Mohawk should take affirmative action for integrated work force." (R20, 25), and walked in a circle in the public customers lobby with the sign. (R-20,21)

The defendant remained mute. (R-22) He did not interfere in any way with any of the other persons in the lobby. (R 21,29,30)

At about 2:40 P.M., Blaisdell requested the defendant to leave (R-20). The defendant said nothing and continued to

walk about the public lobby with his sign until approximately 3:50 P.M. (R-22,28)

During this entire period, uniformed members of the Syracuse Police Department were also present in the lobby. (R-20,27)

At about 3:50 P.M., the uniformed officers arrested the defendant inside the lobby. (R-28)

The record is devoid of testimony that the building was closed to the public, that the defendant's entry was unauthorized or that the defendant entered the building with intent to take possession. Nor does the record contain a shred of testimony that the defendant committed any unlawful act on the premises.

Despite this complete failure of proof, the defendant was convicted of violating §2036 of the Penal Law.

> "A person who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof, or who erects or occupies thereon any hut, or other structure whatever without such authority; and a person who places, erects, or occupies within the bounds of any street or avenue of a city or village, any hut, or other structure, without lawful authority, is guilty of a misdemeanor."

POINT I

THE PEOPLE HAVE FAILED TO PROVE THAT THE DEFENDANT MADE AN UNLAWFUL ENTRY

The chief element of proof required to establish a violation of section 2036 is that the defendant committed an unlawful entry.

In a very similar case, People v. Lawson 44 Misc. 2d 578, 254 N.Y.S. 2d 300 aff'd 16 N.Y. 2d 552, 208 N.E. 2d 466, the Court of Appeals reversed convictions under section 2036 because, although the defendants refused to leave private premises when requested, their entry had not been unlawful. The Appellate Division stated that:

> "Section 2036 in clear and unambiguous language makes criminal only an unauthorized entry upon real property." 44 Misc 578, 580, 254 N.Y.S. 2d 300, 302 (1964)

The Appellate Term further stated, with reference to refusal to leave private property lawfully entered:

> "No case has been called to the Court's attention, or discovered by independent research, which actually holds that the section 2036 covers such a situation." (Id.)

The mere presence of someone with a sign on private property open to the public does not appear to be any crime under the laws of New York, much less a violation of Section 2036. People v. Prinz, 64 Civ. 1666 (1964) See also People v. Collins, 44 Misc. 430, 254 N.Y.S. 2d 792, aff'd 16 N.Y. 2d 554, 208 N.E. 2d 467.

The defendant entered the building without objection from any of the complainant's employees. He was arrested in the customers' service lobby (R-28), a place ordinarily occupied by members of the general public. (R-21,30) No effort was made to prevent his entry into the lobby, nor was he asked to leave for some period of time after he had entered the lobby. (R-19-20) Entering a public place without more, is plainly lawful.

We are dealing here with events that transpired in the customers' service lobby. The record does not contain any testimony that the lobby was closed to the public or that there was any structure on entry into the lobby by any member of the public. Rather, the record shows that throughout the period in question, members of the public entered and exited from the lobby. (R-21, 30)

On the record therefore, the defendant was not arrested for making an entry nor can his entry be deemed to be unlawful or unauthorized. Having made a lawful entry, he could not be convicted of a crime under Section 2036. People v. Lawson supra, People v. Collins supra.

POINT II

EVEN IF DEFENDANT'S ENTRY HAD BEEN UNLAWFUL, THE CONVICTION MUST BE REVERSED BECAUSE THE DEFENDANT DID NOT ENTER WITH INTENT TO TAKE POSSESSION

Section 2036 is an old statute originally designed to deal with squatters, that is, those who make an entry without color of title, with intent to take possession. Laws of 1887 Ch. 396 §2. As such, the statute has been traditionally interpreted as being applicable only to entries on real property made with intent to take possession. People v. Stevens 109 N.Y. 159, 16 N.E. 53 (1888). The Stevens interpretation of the statute was adopted by the Revisers of the Penal Law. Title I §145.05 See Proposed New York Penal Law, Commission Staff Notes §145, p. 348.

There is not one shred of evidence in the Record supporting the notion that the defendant intended to take possession of the building. Such intent could not be inferred from the mere act of walking about the public lobby. Plainly and obviously, defendant did nothing which could be construed as attempting to oust the complainant, its security officers or the Syracuse Police Officers from the building.

On the contrary, defendant's sign (R-25) shows that the came to the building in order to address his views to complainant. This negates any possible notion of intent to take possession. cf. People v. Collins 44 Misc 2d 430, aff'd, 16 N.Y. 2d 554

Therefore, while it is plain that defendant's entry was not authorized, the conviction must be reversed because in any event, his entry was not with intent to take possession.

POINT III

AS A FRANCHISED PUBLIC UTILITY, NIAGARA MOHAWK PARTAKES OF THE CHARACTER OF QUASI-PUBLIC ACTIVITIES. CONSEQUENTLY, FIRST AMENDMENT RIGHTS ARE APPLICABLE AND OCCUPY A PREFERENTIAL POSITION.

As a franchised public utility, the Niagara Mohawk Power Co. is regulated by the Public Service Commission of New York under the Public Service Law. Article 4 of that law subjects Gas and Electric Corporations such as Niagara Mohawk to numerous stringent regulations. Section 68 in particular requires Commission approval for the exercise of any right or privilege under any franchise and for construction of any facility. Niagara Mohawk's property is thus quasi-public and sufficiently affected with a public interest to justify application of constitutional safeguards to members of the general public who enter. Burton v. Wilmington Parking Authority 365 U.S. 715 (1961) Marsh v. Alabama, 326 U.S. 501 (1946). Paraphrasing the words of Judge Tyler in Farmer v. Moses 232 F. Supp. 154 (S.D.N.Y. holding the World's Fair to a similar standard, it would be sophistry to argue or conclude that Niagara Mohawk is a completely private venture, even if it is operated by a private corporation.

In People v. Barisi 193 Misc. 934, 86 N.Y.S. 2d 277 (City Magistrate's Ct. of N.Y., Manhattan, 1948), the right to picket was held to be constitutionally protected free speech, which could be exercised on private property under certain circumstances.

The Supreme Court has repeatedly held that on such property, constitutionally protected free speech takes precendence over criminal trespass statutes, let alone Section 2036 as it is sought to be applied where public or quasi-public premises are involved.

As stated by the Supreme Court in Marsh V. Alabama, supra:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of thosw who use it. 326 U.S. 501, 506
>
> "When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of the press and religion, as we must here, we remain mindful of the fact that the latter occupy a privileged position. (Id at 509)

Recent cases, involving breach of the peace statutes, have reaffirmed the special protection given to free speech. Cox v. Louisiana 85 S. Ct. 453; Edwards v. South Carolina, 372 U.S. 229

Therefore, even if there were a basis for conviction under Section 2036, the defendant's conviction must be reversed on these grounds.

Bov Hallett

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PEOPLE OF THE STATE OF NEW YORK
RESPONDENT

AGAINST MRS. PATRICIA STEEN

AFFIDAVOT

STATE OF NEW YORK
COUNTY OF ONODAGA, SS

I, Richard C. Meyer, have been a resident of LaFayette for the past year and and 3 months and immediately prior to that, a resident of the City of Syracuse, for a period of more than thirty years. During the past 15 years I have served in the Onondaga Central School District as teacher for 8 years and elementary school principal for the past 7 years.

I have known the Steen family through its children as students while both as a teacher and principal. During this period of time I've always found the children well cared for and youngsters with high values. In my contacts with Mrs. Steen as a parent I've found her to be an interested and devoted parent. I've always felt she and her family have been an asset to the community of Nedrow which is adjacent to the City of Syracuse on the south.

I question the amount and doubt the need of bail to insure the return of Mrs. Steen to stand trial. I feel much consideration and thought ought to be made when establishing bail for a person such as Mrs. Steen.

Richard C. Meyer

Sworn to be before me

this 9th day of February 1966

Gordon Cameron

GORDON CAMERON
Notary Public in the State of New York
Qualified in Onon. Co. No. 34-5581275
My Commission Expires March 30, 1966

COUNTY COURT
ONONDAGA COUNTY : STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

A P P E A L

- vs -

FRANK BRITTON, JR., and CAROL M. COSITORE,

Defendants-Appellants.

STATEMENT

This is an appeal from a judgment of conviction for violation of Section 2036 Penal Law, rendered on October 27th, 1965, by the City Court of Syracuse, New York, HON. ROBERT B. O'HARA presiding. Defendant-Appellant BRITTON was sentenced to 90 days in the Onondaga County Penitentiary and Defendant-Appellant COSITORE was sentenced to 30 days in the Onondaga County Penitentiary.

FACTS

The Defendants-Appellants are both members of CORE, a civil rights group. On March 27th, 1965, at approximately 11:30 A. M., they entered the office building of the Niagara Mohawk Corporation located at Erie Boulevard West and North Franklin Street in Syracuse. Their purpose was to arrange for negotiations between Mr. MACHOLD, President of Niagara Mohawk Corporation, and CORE, concerning discriminatory hiring practices.

Defendant-Appellant COSITORE entered the building and a man rang the elevator for her. He did not ask what she was doing in the building. She took the elevator to the sixth floor where the office of Mr. MACHOLD was located. A few minutes later

she was joined by Defendant-Appellant BRITTON.

A receptionist was present on the sixth floor and Defendant-Appellant COSITORE asked her where Mr. MACHOLD's office was located. Both Defendants-Appellants then entered this office. They were seated on a couch when JAMES A. O'NEILL entered the room. He held the position of general attorney for the Niagara Mohawk Corporation. He asked Defendants-Appellants to leave the premises but they remained seated on the couch. He thereupon called the police. When they arrived Defendants-Appellants were again asked to leave. When they did not do so they were taken into custody by the police.

ISSUE PRESENTED

WAS THE DEFENDANTS-APPELLANTS' REFUSAL TO LEAVE PREMISES LAWFULLY ENTERED A VIOLATION OF SECTION 2036 OF THE PENAL LAW?

POINT I

A PERSON WHO REFUSES TO LEAVE PREMISES ENTRY TO WHICH WAS LAWFULLY GAINED, IS NOT GUILTY OF UNLAWFUL INTRUSION ON REAL PROPERTY.

The record clearly shows that Defendants-Appellants entered the office building of the Niagara Mohawk Corporation in a legal manner. The record is devoid of anything to the contrary.

Nothing exists in the record to show that these premises were not open to the public. There is no testimony of any signs warning people to keep out. There is no testimony as to a forced or otherwise illegal entry after business hours when the building is closed. Rather the direct contrary is manifested by the testimony of the PEOPLE's witnesses as to time of the alleged crime.

It is important to reflect therefore on just what proof

the PEOPLE presented as to Defendants-Appellants' entry into the premises. If one searches the record he will realize that the intrusion upon these premises, whether unlawful or not, was a point with which the prosecution did not in the least concern itself. Every prosecution witness, by his own testimony, was placed on the scene after Defendants-Appellants were already seated in the office of Mr. MACHOLD.

Defendant-Appellant COSITORE's testimony showed that she entered the building and the elevator operator secured an elevator for her to use. The prosecution did not produce this elevator operator totestify to any illegal act on the part of Defendant-Appellant.

Upon reaching the sixth floor Defendant-Appellant COSITORE spoke to the receptionist and asked her where Mr. MACHOLD's office was located. There is no evidence that Defendants-Appellants forced their way into this office; got entry to it under false pretenses; or were told by the receptionist not to enter these premises. The PEOPLE did not produce the receptionist.

Once inside, the evidence is uncontradicted that Defendants-Appellants sat on the couch and interfered with no one and created no disturbance. The crux of the PEOPLE's case is that they refused to leave when requested by those in control. While, perhaps, this might or might not be a violation of some provision of the Penal Law, an insuperable difficulty with the PEOPLE's case is that the Court of Appeals has held that such conduct is not a violation of Section 2036 of the Penal Law. As this was the crime Defendants-Appellants were charged with, their conviction must, of necessity, be reversed and the informations against them dismissed.

Section 2036 of the Penal Law has been in effect since

1909, but it wasn't until 1965 that the Court of Appeals considered the point in issue in the case at bar.

PEOPLE v. LAWSON, 44 Misc. 2d 578, 254, N.Y.S. 2d 300 aff'd. 16 N.Y. 2d 551, 260 N.Y.S. 660 (1965), was a case whose facts are strikingly similar to the case at bar. The defendants in that case lawfully entered a real estate office and when a dispute arose concerning rental practices vis a vis [redacted] the race of prospective tenants, defendants refused to leave. Police were summoned to the scene and when defendants still refused to leave, they were charged and convicted under Section 2036. The Appellate Term, First Department reversed the conviction and the Court of Appeals affirmed the reversal.

The Appellate Term's opinion, in part, was as follows:

> "It is clear from the majority opinion of the Court below that there would have been no conviction had defendants complied with the requests to leave made of them. That opinion states that defendants' "remaining in that office thereafter and their refusal to leave the office when requested to do so by complainant and by the police officer, constituted an unlawful intrusion." The District Attorney's brief in this Court is also largely predicated upon the refusal of defendants to leave the premises upon request.
>
> In this Court's opinion, Section 2036, supra, in clear and unambiguous language, makes criminal only an unauthorized entry upon real property. It does not purport to make criminal a refusal to leave property which had been lawfully entered. No case has been called to the court's attention, or discovered by independent research, which actually holds that the section covers such a situation. The "Proposed New York Penal Law", drafted and recommended by the Temporary State Commission on Revision of the Penal Law and Criminal Code, contains a section (145.10) which makes one a criminal trespasser who "knowingly enters or remains unlawfully in a building or upon real property" (emphasis supplied). The commission's notes states that "In cases where it is not provable that an intruder entered with the requisite criminal intent, appropriate criminal sanctions should be available." The note adds: "The trespass provisions

> in the existing Penal Law (Secs. 1425(9); 2036); however, are at best ill-defined and narrow in scope (People v. Stevens, 109 N.Y. 159 (16 N.E. 53). The proposed Penal Law corrects these deficiencies." It thus seems clear that the Commission recognized that Section 2036 does not presently make criminal the refusal to leave real property which had been entered lawfully."

In People v. Collins, 44 Misc. 2d 430, 254 N.Y.S. 2d 182 aff'd 16 N.Y. 2d 554, 260 N.Y.S. 2d 660 the Court of Appeals affirmed the reversal of a judgment of conviction by the Appellate Term, Second Department. The Appellate Term's opinion held as follows:

> "While Section 2036 of the Penal Law makes it a misdemeanor to intrude unlawfully on the land of another, it does not make it unlawful to remain, after being requested to leave, on premises theretofore lawfully entered."

To solder and patch up the flaws and imperfections in the PEOPLE's case, various irrelevancies were introduced, such as the manner in which Defendants-Appellants were removed by the police, the length of their residence in Syracuse, etc. It would be absurd and ridiculous to imagine that these facts could in any way be logically relevant to whether or not Defendants-Appellants were guilty of the crime charged.

Thus, under the holdings of the Court of Appeals in the Lawson and Collins cases, in order to sustain a conviction of violation of Section 2036, there must be proof beyond a reasonable doubt of an unlawful entry. In the case at bar there is, at best, only proof of a refusal to leave premises after being requested so to do.

While some my disagree with the ends of the organization to which Defendants-Appellants belonged or some may support these ends but disagree with the means used, or some may consider the conduct of Defendants-Appellants to be rude or offensive, the

only consideration, in law, is whether these Defendants-Appellants violated Section 2036. We challenge the learned District Attorney to show to the Court where in the record there is any proof of illegal entry to these premises. Name one single witness the PEOPLE presented as to entry? Name one single witness who told Defendants-Appellants they could not enter? Name one single witness who testified that there are signs warning people not to enter these premises? The elevator operator and the receptionist were the only possiblewitnesses as to entry and the PEOPLE never called them to the stand.

POINT II

THE JUDGMENTS OF CONVICTIONS SHOULD BE REVERSED AND THE INFORMATIONS DISMISSED.

The complete failure of proof upon the part of the PEOPLE's case requires the reversal of these judgments of convictions and the dismissal of these informations. It is also respectfully pointed out to the Court that, considering the background of these Defendants-Appellants, the sentences imposed were unduly harsh.

As has been stated several times by the prosecution, Mr. Britton's actions along with Miss Cositore's on March 17, 1965, did not constitute an isolated incident. There had been picketing of the Niagara Mohawk Corporation by CORE for six weeks. There had been negotiations held between the company and various other civic organizations, including CORE, for a year and a half. Between March and May of 1965 some thirty people were arrested and charged with seventy-six crimes. Some pleaded guilty to a multiplicity of charges. Yet no one, no matter what their plea, received more than a fine or a maximum

jail sentence of over thirty days <u>except</u> Mr. Britton

It is hard to justify this on any grounds. It becomes harder when one looks at the facts. Mr. Britton took part in a sit-in demonstration. So did most of the others. He did not block traffic, cause any special equipment to be called, or in any way inconvenience the public as some of those did who received lesser sentences. In fact, it could not even be said that he inconvenienced Mr. MACHOLD in whose office he sat, as Mr. MACHOLD was not there.

The only justification given by the trial judge for Mr. Britton's extremely harsh sentence, was that he had been arrested before for a similar demonstration. This is true. It is also true for several others who received nothing more than a fine.

Mr. Britton, a Negro, has been a member of this community for some time. He lives here with his wife and four small children and works to support them as best he can. He is not an educated man, but he is a concerned man. What he did he did out of a need to express his concern for his family and his people, and to do it without violence, injuring neither person nor property in the process.

He did no more than any of the twenty-nine others. Indeed, he did far less than some. He was not at any time shown to be a ringleader and, in fact, was not. He was not a ringleader, not an instigator, not a man with a criminal history, not a drifter, not a destroyer of person or property and yet, he was singled out for punishment more extreme than any other member of his group.

He had not asked for any special mercy from the court but he did not, upon his sentence, receive justice.

Dated: March 10, 1966
Syracuse, New York

Respectfully submitted,

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[Inclosed, Dougherty to Nagler, 1966, May 31]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 312—September Term, 1965.

(Argued April 5, 1966 Decided May 18, 1966.)

Docket No. 29982

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee,

—v.—

DAVID CROCKETT HUTCHINSON, *et al.*,

Defendants-Appellants.

Before:

SMITH, HAYS, *Circuit Judges,* and
CLARIE, *District Judge.**

This is an appeal from an order of the United States District Court for the Northern District of New York remanding certain criminal actions in which the appellants were defendants, to the criminal courts of the State of New York from which they have been removed, pursuant to 28 U. S. C. A. §1443(1)(2).

Affirmed.

* Of the District Court for Connecticut, sitting by designation.

EDWARD F. GERBER, Assistant District Attorney, Syracuse, New York (Francis R. Moran, District Attorney, and Lucien Ali, Assistant District Attorney, Syracuse, New York, on the brief), *for the Appellee.*

FAITH A. SEIDENBERG, Syracuse, New York, James D. Dougherty, New York, New York (Stephen M. Nagler and Carl Rachlin, on the brief), *for the Appellants.*

CLARIE, *District Judge*:

This is an appeal from an order of the United States District Court for the Northern District of New York remanding certain criminal actions in which the appellants were defendants, to the criminal courts of the State of New York from which they had been removed, pursuant to 28 U. S. C. A. §1443(1)(2).[1] Jurisdiction of this Court is founded on 28 U. S. C. A. §1447(d).

The appeal involves approximately thirty defendants who were arrested in and around Syracuse, New York, for offenses, not uniformly applicable to all, which occurred on ten different dates between March 15, 1965 and May 17, 1965, inclusive. They were charged with violating various sections of the New York Penal Law, including §722 (dis-

1 "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

orderly conduct); §2036 (unlawful intrusion on private property); §1530(4) (public nuisance); and §242 (assault in the second degree). At the time of their arrests, the defendants were engaged in civil rights demonstrations to protest alleged discriminatory employment policies of the Niagara Mohawk Power Corporation.

As they were arrested and arraigned, varying amounts of bail were set, which the appellants now claim were excessive and discriminatory. One bond was set at $5,500, for a defendant charged with eight separate crimes; four were set at $1,000 each for defendants charged with four separate offenses, and fourteen at $500 each; and according to counsel at the argument of this appeal, some were released without bail. One defendant, a material witness, had bail fixed in the sum of $10,000 to assure his presence in what appears to have been an offense not related to his own.

A petition for removal of the cases to the United States District Court for the Northern District of New York, was filed by the appellants on June 7, 1965, pursuant to 28 U. S. C. A. §1443(1). It alleged that the state court had set extraordinarily high bail as a punitive measure because they were engaged in civil rights demonstrations and that the appellants had been denied the protection of certain federal rights, including their right to reasonable bail and to equal protection of the laws. It also claimed that the appellants had probable cause for believing that they would be denied or be unable to enforce their rights in the state court; and that the acts of which the appellants were accused were carried out under color of authority of the United States Constitution and the Civil Rights Act which required their protection as afforded by 28 U. S. C. A. §1443(2).

On August 27, 1965, the District Court remanded the cases to the state courts on the ground that the facts failed to support the allegations in the removal petition and from this order an appeal was filed. The appellants' request to stay all state criminal proceedings pending the outcome of this appeal was denied (Anderson, *C.J.*). An application was then filed with the United States Supreme Court requesting a stay order enjoining the state prosecution; this was denied by Mr. Justice Harlan on September 20, 1965. The cases proceeded to trial in the state criminal courts during September and October, 1965.

The appellants attack the District Court's remand order, claiming that uniformly high and excessive bail was set for these civil rights demonstrators, which was designed and calculated to discourage and suppress their activities. They claim that it constituted a denial of equal rights and demonstrated that a fair trial could not be had on the merits, in a state court that had set such an exceedingly high bail.

An overall review of the record, however, fails to give substance to their claims. The bail set by the state court was not in fact unreasonable. The Court rejected the strong demands of the prosecutor for substantial bail and considered each case separately. Not only did the bail vary according to the charge or charges against each defendant, but in several instances defendants were released without bond. It is significant to note, that all defendants who desired bail did obtain it. A summary of the final disposition of these cases in the state courts would appear to reveal that there were 23 guilty pleas, 9 findings of guilty, and 3 dismissals.

The appellants are not claiming discrimination because of race, but rather because of their role as civil rights

demonstrators. They claim that the bail set by the court was extraordinarily higher than that typically set in the county for similar statutory offenders not engaged in civil rights demonstrations.

As the District Court judge rightly observed, the setting of bail is a highly individualized process and does not lend itself to slide rule resolution. There are patently no supporting facts of substance, except the conclusory allegations of the appellants, to warrant this Court's intervening. The action of the state court on the bail issue constituted a proper exercise of discretion and was not motivated by intimidation, coercion, or suppression of legitimate civil rights activities. Nor have the defendants been denied any protected right or been subject to trial on any discriminatory or unfounded prosecution; nor is there any substance to their claim that any of them have or will be unable to enforce any procedural rights in the state court. The removal authority of 28 U. S. C. A. §1443(1) is therefore not applicable. See *Peacock* v. *City of Greenwood,* 347 F. 2d 679 (5th Cir. 1965); *Steel* v. *Superior Court,* 164 F. 2d 781 (9th Cir. 1948); *Rachael* v. *Georgia,* 342 F. 2d 336 (5th Cir. 1965).

Prosecution for violation of the criminal laws of a state, during the conduct of civil rights demonstrations, does not afford the right of removal to Federal Courts in the absence of a federal law authorizing the conduct complained of. In *New York* v. *Galamison,* 342 F. 2d 255, 264 (2d Cir. 1965), this Court held that "A private person claiming the benefit of §1443(2) . . . must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense. . . ."

Appellants have pointed to no such law nor have they indicated how they are denied "a right under any law providing for the equal civil rights of citizens," 28 U. S. C. A. §1443(1).

We find no error. The order of the District Court is affirmed.

United States Court of Appeals

FOR THE SECOND CIRCUIT

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

—VS.—

DAVID CROCKETT HUTCHINSON, ROGER KNAPP, RONALD DAVIDSON, CHARLES C. GOLDSMITH, SUSAN TYLER, CAROL M. COSITORE, FRANK BRITTON, JR., ELIZABETH MILLER, DONNA DRAKE, PATRICIA STEEN, DAVID MILLER, EDDIE PETERSON, EDWIN DAY, ROBERT S. LUBETSKY, JOHN L. MCDOWELL, ROBERT L. TENNEY, PAUL D. LEONARD, BYRON FOX, IRWIN DEUTSCHER, CHARLES E. SPARKS, PHYLLIS JOHNSON, REV. EMORY PROCTOR, PATRICIA SANDRO, ESTELLA DELOACH, JAMES HOPE, LEROY WRIGHT, JOHN WILLIAMS, MARY ANN RUTLEDGE, LEON RUSSELL, MARILYN SAFIR,

Defendants-Appellants.

APPELLANTS' BRIEF AND APPENDIX

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§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. June 25, 1948, c. 646, 62 Stat. 938.

§ 1447. Procedure after removal generally

* * * * *

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise. As amended July 2, 1964, Pub.L. 88–352, Title IX, § 901, 78 Stat. 266.

United States Court of Appeals

FOR THE SECOND CIRCUIT

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

—vs.—

DAVID CROCKETT HUTCHINSON, ROGER KNAPP, RONALD DAVIDSON, CHARLES C. GOLDSMITH, SUSAN TYLER, CAROL M. COSITORE, FRANK BRITTON, JR., ELIZABETH MILLER, DONNA DRAKE, PATRICIA STEEN, DAVID MILLER, EDDIE PETERSON, EDWIN DAY, ROBERT S. LUBETSKY, JOHN L. MCDOWELL, ROBERT L. TENNEY, PAUL D. LEONARD, BYRON FOX, IRWIN DEUTSCHER, CHARLES E. SPARKS, PHYLLIS JOHNSON, REV. EMORY PROCTOR, PATRICIA SANDRO, ESTELLA DELOACH, JAMES HOPE, LEROY WRIGHT, JOHN WILLIAMS, MARY ANN RUTLEDGE, LEON RUSSELL, MARILYN SAFIR,

Defendants-Appellants.

APPELLANTS' BRIEF

Preliminary Statement

This brief is submitted in support of appellants' appeal from an order of the United States District Court, Northern District of New York, entered August 27, 1965, remanding certain criminal actions in which appellants were defendants to the criminal courts of the State of New York.

Appellants were arrested at various dates during the period from March, 1965 through May, 1965 in and around

Syracuse, New York, and were charged with violating various sections of the New York Penal Law, including Section 722 (disorderly conduct), Section 2036 (unlawful intrusion on private property), Section 1530(4) (public nuisance) and Section 242 (assault in the second degree). At the time of their arrests, appellants were peaceably engaged in civil rights demonstrations, undertaken for the purpose of protesting the discriminatory employment policies of Niagara Mohawk Power Corp.

Despite the widely divergent backgrounds of the various arrested persons and the very high character and financial qualifications of many of them,* and despite the minor character of the charges, the Court, in each instance, set bail at $500 at the urging of the Syracuse District Attorney. The Court refused to consider, in setting bail, the individual circumstances of the accused.

On June 7, 1965, appellants filed a petition for the removal of the pending criminal actions to the United States District Court, Northern District of New York under (i) 28 U. S. C. §1443(1), because the actions of the state court in setting extraordinarily high bail as a punitive measure denied appellants the protection of certain federal rights, including their right to reasonable bail and to equal protection of the laws and gave appellants probable cause for believing that they would be denied or would not be able to enforce their rights in the state court; and (ii) 28 U. S. C. §1443(2), because the acts of appellants for which they were accused were done under color of authority of the United States Constitution and the Civil Rights Act.

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* See, e.g., Appendix C.

The Syracuse District Attorney's motion to remand the cases was granted and all the actions were remanded to the state courts. A Notice of Appeal was filed with the Clerk of this Court on August 30, 1965 and a request for a stay of all state criminal proceedings pending the outcome of this appeal was made to this Court on September 7, 1965 and was denied on September 13, 1965. The Syracuse District Attorney's office, with the tacit approval of the courts, set down the cases for immediate trials, commencing on or about September 21, 1965, presumably in order to deny appellants their federally guaranteed right to an appeal from the remand order, under 28 U. S. C. §1447(d). Trials were held in the state criminal courts in September and October, 1965.

ARGUMENT

I.

The imposition of uniformly high and unnecessary bails as a punitive measure on a particular class of persons is a denial to these persons of the equal protection of the laws.

The purpose of bail is to relieve the accused of imprisonment while securing his attendance at court at all times when his presence may be lawfully required. *U. S.* v. *Foster,* 79 F. Supp. 422 (S. D. N. Y. 1948). Simply stated, bail serves to *avoid,* to the extent possible under the circumstances, any punishment of an accused prior to his conviction. The use of bail to *inflict* on rather than to avoid punishment of an accused (and collaterally, to deter others from acting in any way that might result in placing them in the same position as such accused) is clearly in violation

of federal law and Amendments VIII and XIV to the Constitution of the United States of America. "[T]he fixing of bail for any individual defendant must be based upon standards relevant to the purpose * * *." *Stack* v. *Boyle*, 342 U. S. 1, 5 (1951). The Supreme Court in that appeal found error where "bail for each petitioner has been fixed in a sum much higher than that usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action * * *." *Id.* at 5.

The action of the state criminal court in setting uniformly high bails on each of the appellants without a hearing and in recognition of only one wholly irrelevant consideration—that they were members of an unfavored classification, i.e., civil rights demonstrators, constituted a clear denial of appellants' rights to equal protection of the laws. The record on appeal reveals only one factor considered by the court setting bail—the argument by an assistant district attorney for Onondaga County that appellants should be punished before trial to deter others of their ilk.* That the court agreed completely with the assistant district attorney's reason for setting $500 bail and that it imposed the extraordinarily high bail on each of the appellants for this reason alone are established by two facts. First, it did not further inquire into the backgrounds of the appel-

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* The court set bail in the amount recommended by the assistant district attorney. The assistant district attorney recommended bail in that amount for the following reasons:

> "From what I understand, this is going to be a continuing affair until Niagara Mohawk Company succumbs to their demands and we are going to have trouble unless bail is set on all these cases.
>
> "These people are interfering with progress and the business of Niagara Mohawk Company and the only way it's going to stop is to impose bail of $500."

lants despite repeated offers by appellants' counsel to furnish such information. Second, it followed the prosecutor's recommendation and set uniform amounts of bail disproportionately higher than is usually set in similar circumstances where similar offenses are involved (see Affidavit of Patricia Skigem submitted with papers in opposition to respondent's motion to remand; Exhibit B herein). As a result, many appellants who were students or professors at Syracuse University with strong ties through families and homes to the Syracuse community were ordered to post bail in an amount many times higher than customarily is required of accused possessed of far less reassuring credentials. As appellants' petition for removal clearly establishes, no bail should have been required in these cases. The action of the court in setting bail without an adequate hearing and in complete disregard of the relevant facts that appellants' counsel had been able to set before it, was a violation of appellants' federally protected rights and gave appellants cause for believing that they would not be able to enforce their rights in the Syracuse courts.

II.

Where a state criminal court has taken action as to an accused which indicates that a substantial issue exists as to whether the accused has been or will be denied the protection of a constitutional right in the state court, removal under 28 U. S. C. §1443 is permissible and remand is reversible error.

Appellants in their removal petition, petitioned for removal under subsections (1) and (2) of Section 1443, setting forth in detail facts which indicate that the state courts have acted or will act to deny appellants equal protection of

the laws and due process. And, as stated by Judge Friendly in *People* v. *Galamison,* 342 F. 2d 255 (2nd Cir. 1965) at p. 271:

> "• • • • There is no possible doubt that §1443(1) applies to the grantees of equal rights under the equal protection clause and egalitarian statutes, and it imposes no requirement of showing 'color of authority' or 'inconsistency' although it does demand a substantial claim of denial or inability to enforce. • • • "

Accord: *Peacock* v. *City of Greenwood,* 347 F. 2d 679 (5th Cir. 1965)

By demonstrating a denial of equal protection of the laws by the state, appellants have established their right to removal under subsection (1). It is contrary to the plain meaning of the statute and its legislative history to argue that subsection (1) only permits removal where the denial of equal protection of the laws is by action of the legislative branch of the state and not where the denial is by action of the judicial or executive branch. Congress, in passing Section 1443, intended to protect the individual against the suppression by local authorities of the peaceful expression of unpopular views. That such suppression today may take a relatively more subtle form should not contain its own reward. Where the public officials of a local community connive unconstitutionally to apply an otherwise constitutional statute in furtherance of their program of illegal suppression of unpopular views, Section 1443 was intended by the draftsmen to apply* to permit removal

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* Those most closely concerned with passage of the Act indicated that they intended for it to apply to instances involving the state vagrancy laws and similar statutes where the denial of rights clearly would lie in their discriminatory application. Cong. Globe 39th Cong., 1st Sess., 1123-24, March 1, 1866, remarks of Representative Cook; March 2, 1866, remarks of Representative Thayer.

to the federal courts for all purposes. Indeed, it is patently clear that the probability of the denial of rights in a state court is greater, and removal clearly more imperative, where the discriminating force is not the legislature but the selfsame court which will sit in final judgment on the accused. The United States Court of Appeals for the 5th Circuit implicitly endorsed this view in its opinion in *Rachel* v. *State of Georgia,* 342 F. 2d 336 (1965), by stating that an accurate statement of the prerequisite to application of subsection (1) is "that the denial of protected rights be made to appear in advance of trial, * * *." *Id.* at 339. The court in that case applied this statement of the law and found remand to be reversible error, even though the state statute involved, an anti-trespass statute, was not unconstitutional on its face. Subsequently, in *Peacock* v. *City of Greenwood,* 347 F. 2d 679 (1965), the 5th Circuit held that removal would lie where a constitutional state statute was applied in a manner contrary to the equal protection clause.

Appellants' cases here fall squarely within the rule stated in the above cases. The New York State Code of Criminal Procedure has been applied in a manner contrary to the equal protection clause. As Judge Friendly noted at page 271 of his opinion in *People* v. *Galamison,* 342 F. 2d 255 (2nd Cir. 1965), the discriminatory setting of bails clearly is a denial of equal protection of the laws. Thus appellants clearly possessed the right to remove their cases to the federal courts under 28 U. S. C. §1443(1).

III.

28 U. S. C. §1447(d) permits appeal from an order to remand where the case was removed pursuant to 28 U. S. C. §1443.

The Notice of Appeal from the order of the United States District Court, Northern District of New York, remanding the actions, was filed on August 30, 1965, prior to the commencement of any trials in the state courts. An application for a stay of the trials was made to this court and denied. The District Attorney for the County of Onondaga and the state courts demonstrated once again the strong possibility that appellants would be denied their rights in the state court by working to hold as many trials as possible before the earliest date on which the appeal could be heard. This very blatant attempt to deprive this court of its jurisdiction on appeal and the appellants of their right to appeal under 28 U. S. C. §1447(d) cannot be permitted. To permit it would be to encourage discriminatory state officials to conduct a "race to the courthouse" with the federal appellate courts and to, in effect, restrict the accused's scope of appeal to whatever hearing he might obtain on his application for a stay. Upon far more rational grounds must the fate of an accused's constitutional rights be determined.

CONCLUSION

For the reasons stated above, we respectfully request that this court reverse the order of the United States District Court, Northern District of New York, remanding appellants' cases to the courts of the State of New York.

Dated: New York, New York
January 31, 1966

Respectfully submitted,

FAITH A. SEIDENBERG
JAMES D. DOUGHERTY
Attorneys for Appellants

APPENDIXES

APPENDIX

APPENDIX A

Memorandum-Decision and Order

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

65-CV-224

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

DAVID CROCKETT HUTCHINSON, ROGER KNAPP, RONALD DAVIDSON, CHARLES C. GOLDSMITH, SUSAN TYLER, CAROL M. COSITORE, FRANK BRITTON, JR., ELIZABETH MILLER, DONNA DRAKE, PATRICIA STEEN, DAVID MILLER, EDDIE PETERSON, EDWIN DAY, ROBERT S. LUBETSKY, JOHN L. MCDOWELL, ROBERT L. TENNEY, PAUL D. LEONARD, BYRON FOX, IRWIN DEUTSCHER, CHARLES E. SPARKS, PHYLLIS JOHNSON, REV. EMORY PROCTOR, PATRICIA SANDRO, ESTELLA DELOACH, JAMES HOPE, LEROY WRIGHT, JOHN WILLIAMS, MARY ANN RUTLEDGE, LEON RUSSELL and MARILYN SAFIR,

Defendant-Petitioners.

APPEARANCES:

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Memorandum-Decision and Order

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Of Counsel

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EDMUND PORT, *Judge*

Criminal prosecutions pending in the state courts against each of the above named defendants were removed to this court on petition of the defendants' attorney. The district attorney charged with the prosecution of the alleged offenses has moved to remand the cases to the state courts in which the prosecutions were originally instituted.

Whether the cases should be prosecuted in this court instead of the state courts requires an examination of the petition to remove. The petition is technically deficient. It includes thirty different charges pending in different courts and involving thirty defendants. Clarity in the presentation of the claims of the defendants is hardly promoted in this manner. However, the district attorney has waived any objection to the form of the removal petition and the motion to remand will be determined on the merits.

The operative facts set forth in the petition are not complex.

The defendants were arrested on charges of:

1—Disorderly conduct (New York Penal Law, Section 722).

2—Intrusion on private property without authority of the owner (New York Penal Law, Section 2036).

3—Public nuisance (New York Penal Law, Section 1530).

4—Second degree assault (New York Penal Law, Section 242).

5—Obstructing and interfering with a police officer in the process of making an arrest (New York Penal Law, Section 1851).

The activities out of which the charges grew were in connection with demonstrations to highlight alleged discriminatory hiring practices of Niagara Mohawk Power Corporation.

The petitioners complain that bail was fixed in excessively high amounts. The petition discloses that bail was fixed in the sum of $500.00 as to fourteen defendants, $1,000.00 as to four defendants, and $5,500.00 as to one defendant. Bail in the sum of $10,000.00 was fixed to assure the presence of one defendant as a material witness. Another defendant refused his release on bail, the amount of which if it had been fixed was not disclosed. There is no information as to the bail fixed, if any, with reference to the remaining defendants.

The petitioners point to transcripts of a portion of the proceedings in the City Court as establishing their claim of a denial of equal rights.

In the case of David Miller, much stress is placed on a because the demonstrations were "going to be a continuing affair * * * and we are going to have trouble unless bail is set on all these cases." Defendant's counsel took exception to the basis on which bail was asked to be set. The court apparently did not share the philosophy of the prosecutor. He states, "Well, that is his request and I will listen to both sides and do what I think is right." The court also stated upon further urging of the district attorney that "[t]he rule on bail is not going to be perverted, and I am going to set bail, according to the statutes." He then asked a representative of the Vera Foundation to talk with the defendant and advise the court with reference to the matter.

In the transcript of the proceedings against Byron L. Fox, Charles E. Sparks, Phyllis E. Johnson and Irwin Deutscher the petitioners again objected to the request of the district attorney that bail be fixed at $500.00. In this case the defendants were charged with disorderly conduct and unlawful intrusion upon private property. Defendants' counsel when asked to state the grounds for the objection stated, "I object that he asks for bail before hearing the defendants qualifications." The court advised defendants' counsel, "I will be glad to listen to anything you may tell me on that question." Petitioners' attorney replied, "I was only suggesting that they can recommend and they have recommended parole in some cases."

The transcript of the proceedings in the case of Roger Knapp is also attached as an exhibit. The question of bail was not raised. There petitioner's attorney apparently sought to establish the novel proposition that her client was

being discriminated against because the case was noticed for trial without her consent and the district attorney requested a psychiatric examination without her request but with her acquiescence.

A transcript of part of the proceedings in the matter of Charlie C. Goldsmith as a material witness is also attached to the petition. His bail was fixed at $10,000.00. The objection here is that the court considered the fact that the defendants in that case were not strangers to the court, and were "out on bail at the time this happened."

In addition to the exhibits attached to the petition, there is an affidavit attached to the memorandum, submitted by the petitioners, in opposition to the motion to remand. This affidavit indicates that a law student examined the Syracuse City Court dockets for the periods from January, 1963, to September, 1963, and January, 1964, to April, 1965. No reason is given for excluding the last four months of 1963.

The examination disclosed that during that period only two cases involving material witnesses were found. The bail was not in excess of $500.00.

Excluding the cases involved in the matters before the court, the affiant indicates that she found seventy-three not guilty pleas were entered in cases involving violations of Section 722 (2). Three students were held on $100.00 bail each. The others were paroled without bail.

There were three cases alleging violations of 722 (4) all of which were released on parole with no bail required.

An examination of charges under Section 2036 indicated that half of the cases involved students and all of the students charged were released without bail.

In the only case found by the affiant charging a violation of Section 1530, the defendant was paroled with no bail.

The petition alleges that nine of the fourteen defendants for whom bail was fixed at $500.00 were residents of the City of Syracuse. Included in the nine are two university professors.

The four defendants for whom bail was fixed in the sum of $1,000.00 are alleged to be local residents without a prior criminal record. The complaint as to these defendants is that in fixing bail it is assumed that the judge considered the fact that each of the defendants was charged with four separate crimes. The same complaint is made with reference to the defendant for whom bail in the sum of $5,500.00 was fixed. He was charged with eight different crimes.

There are a great many other conclusory allegations in the petition and many extravagant and unsupported charges against the prosecutors and the judges fixing bail, which may afford satisfaction to the author but contribute little to the task of this court.

The cases should be remanded to the state courts unless the petition for removal is encompassed within the provisions of 28 U.S.C.A.1443.[1]

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[1] "§ 1443. Civil right cases.

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal

In approaching this problem it would be well to be mindful of the admonition of Mr. Justice Stone that " [d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." Healy v. Ratta, 292 U.S. 263, 270 (1934).

Petitioners claim the right of removal under 28 U.S.C.A. 1443 (2) on the grounds that the acts with which they are charged were committed "under color of authority derived" from the Fifth, Eighth and Fourteenth Amendments and the Civil Rights Statutes (42 U.S.C.A. 1983, 1985, 1986).

The acts of the defendant petitioners alleged by the state to be violative of its criminal laws cannot be insulated from prosecution in the state courts by removal to this court under 28 U.S.C.A. 1443 (2). The demonstrations which formed the backdrop for the alleged illegal conduct did not transform such conduct into acts "under color of authority derived from any law providing for equal rights", so as to divest the state courts of jurisdiction and to clothe this court with jurisdiction to try these defendants on purely state charges. People of The State of New York v. Galamison, 342 F.2d 255 (2 Cir., 1965), cert. den. 380 U.S. 977.

The petitioners "must point to some law that directs or encourages [them] to act in a certain manner, not merely

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civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

to a generalized constitutional provision that will give [them] a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with [them]." People of The State of New York v. Galamison, supra.

The most searching examination of the amendments and civil rights statutes pointed to by the petitioners fails to disclose either direction or encouragement to perform the acts alleged by the state to be in violation of its laws.

Does Section 1443 (1) entitle the petitioners to remove their cases? The answer is no.

In the language of the petition the right of removal arises:

> (a) Because of certain acts and statements by the prosecuting attorney for the State of New York and certain acts by the state court pursuant to such acts and statements by the prosecution (as described below), there is probable cause for petitioners, their counsel, and this Court to believe that petitioners have been denied and will not be able effectively to enforce in the state courts their rights to reasonable bail, to due process of law, and to equal protection of the laws. (28 U.S.C.A. § 1443(1).)

The facts alleged fail to support this conclusion. The claimed denial or inability "to enforce in the state courts their rights to reasonable bail, to due process of law and to equal protection of the laws," rests upon the fixing of allegedly excessive bail.

As every judge who has ever sat as a committing magistrate and every lawyer who has ever participated in a criminal case knows the fixing of bail is a highly individualized process. It does not lend itself to slide rule resolution. The determination of the amount of bail depends on a number of factors including, the nature of the crime charged, the manner in which it was purportedly committed, the character, reputation and stability of the defendant, and the facts surrounding the commission of the alleged offense. The petitioners point to statements of the prosecutor to support his request for bail which they claim, with some justification, not to be pertinent to the question of bail. However, from the information made available in the petition for removal there is nothing to indicate that the various judges in fixing bail discriminated against the defendants.

It does not appear whether the court in fixing bail considered the fact that the offenses charged were committed in connection with demonstrations which have popularly been designated as "civil disobedience." If the court did consider this fact, as claimed by petitioners, it would seem to be a proper matter for consideration. A person who is deliberately conducting himself in a manner alleged to be violative of the general criminal statutes of New York, or who refuses release on bail, or who goes on a hunger strike, in an effort to dramatize an alleged wrong might easily feel that a refusal to appear for trial would lend a more dramatic touch than a drab trial involving such undramatic occurrences as sitting on a vice-president's porch or blocking the entrance to a parking lot.

The results of the examination of the dockets of the City Court with reference to the bail situation during the period covered by the investigator's affidavit does nothing to support the charge of a denial or inability to enforce the petitioners equal rights. In the cases examined under Section 722 (2) we are told that only three students were required to post bail of $100.00. We are not told, however, how many students were charged with that violation. Nor are we told the circumstances surrounding the alleged violations in those cases or in any of the other cases covered in the affidavit.

In the cases charging a violation of Section 2036 we are told that all of the students charged were released on parole and without bail. However, we are not told whether all of the students constituted one or one hundred. The cases involving material witnesses and violations under Section 722 (4) and Section 1530, consisting of two, three and one case respectively, are obviously too few in number from which to draw any conclusions. There is no direct allegation in the petition that any of the defendants for whom it is claimed excessive bail was fixed were students. It can be inferred, however, from one of the exhibits attached to the petition that the defendant Miller is a student. No allegation is made that there was discrimination against the defendants by reason of color. The petition indicates that two of the seven defendants arrested on May 12, 1965 at the Onondaga County War Memorial Auditorium were Negroes, but they are otherwise unidentified.

The petitioners have failed to establish "a substantial claim of denial or inability to enforce," People of The State of New York v. Galamison, supra.

As Judge Friendly recognized in Galamison (p. 271), even if a substantial claim of denial or inability to enforce were established, it would not be sufficient to afford relief under Section 1443 (1) as construed in Virginia v. Rives, 100 U.S. 313 (1880); Neil v. Delaware, 103 U.S. 370 (1881) and Com. of Kentucky v. Powers, 201 U.S. 1 (1906), because those cases limited the application of 1443 (1) to a denial by state law as distinguished from state practice. As Judge Friendly points out, the time may be ripe for a reexamination of these "restrictive decisions." This court is not the proper forum in which to conduct a reexamination of Supreme Court decisions that have remained undisturbed for over half a century.

Even were I to have found, which I have not, that the petition made out a "substantial claim of denial or inability to enforce" under Section 1443 (1), Com. of Kentucky v. Powers, supra, would compel a remand of the cases.

Accordingly, the motion to remand is granted in all respects, and it is

Ordered that the cases involving the defendants set forth in the petition and amended petition for removal herein, be and they hereby are remanded to the respective state courts in which each prosecution was instituted.

EDMUND PORT
United States District Judge

Dated: August 27, 1965
Auburn, New York

APPENDIX B

Affidavit of Patricia Skigen

I, PATRICIA SKIGEN of 128 Henry St., Syracuse, New York, a law student at Yale University, New Haven, Connecticut, am employed for the summer by the Law Students Civil Rights Research Council at 156 Fifth Ave., New York 10, New York being duly sworn depose and say as follows:

On June 14, 1965, I was asked by Mrs. Faith Seidenberg to peruse the Syracuse City Court dockets and to tabulate the bails established for various offenses as part of a general research project concerning the determination of bail. To date, I have reviewed docket entries covering nearly two years, including the periods of January 1963 to September 3, 1963, and January 1964 to April 12, 1965.

During the course of my research I noted the following facts with respect to the bails levied for material witnesses and for defendants charged with violations of §§722(2), 722(3), 722(4), 2036 and 1530 of the *New York Penal Law:*

(a) There were, during the indicated span of time, only two cases involving material witnesses. In neither case was the bail greater than $500.00.

(b) Under 722(2), *discounting* the cases involved in the removal petition, seventy-three (73) "not guilty" pleas were entered.

Of these, *no* students were held to $500.00 bail. In fact, the only three students held to bail were held for $100.00 each. All others were paroled without bail.

(c) Under 722(4), there were only three cases and *all* three (a student, an unemployed man over twenty, and a working adult) were released on parole with no bail required.

(d) Under 2036, half of the cases involved students, and *all* the students charged were released on parole and without bail.

(e) Under 1530, there arose only one public nuisance charge for the two years researched. Though an adult and employed, the man was paroled with no bail charged.

I have read the above and know the statements made therein to be true, for the reasons stated.

.....

APPENDIX C

Affidavit of Donna Drake

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

DONNA M. DRAKE, *et al.*,

Appellants.

State of New York
County of Onondaga, ss.,

DONNA DRAKE being duly sworn, deposes and says:

1. I am one of the people arrested at the offices of Niagara-Mohawk Power Company on March 18, 1965, while participating in a protest demonstration against employment discrimination.

2. I was charged with violating Sections 722 and 2036 of the Penal Law.

3. During arraignment District Attorney Mathew Namishia requested $500 bail. My lawyer, Faith Seidenberg requested that my bail be waived. The judge was about to waive bail when the D. A. insisted that the high bail was necessary to control the demonstrations against Niagara-

Mohawk. Bail was fixed at $500 pending the investigation of my references by a representative of the VERA Foundation. To my knowledge he has never contacted any of them.

4. I have resided at 102 Peck Court in the city of Syracuse for three years.

5. I am presently employed as a teacher in the experimental Score School project for high school drop outs and have been so employed since November 1964.

6. I have been married for six years and have two children. My husband is employed by Syracuse University as an instructor and is currently working on a PhD in mathematics.

7. I had no criminal record at this time.

DONNA M. DRAKE

Sworn to before me this
28 day of January, 1966.

/s/ DEALTON G. STEVENS

DeAlton G. Stevens, Notary Public in the State
of New York, Onondaga County, No. 34-3843650
My Commission Expires March 30, 1967

Affidavit of William Mangin

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—Against—

DONNA M. DRAKE, *et al.*,

Appellants.

State of New York
County of Onondaga, ss.,

WILLIAM MANGIN being duly sworn deposes and says:

1. I reside at 712 Ackerman Ave., Syracuse, New York. I am a professor at Syracuse University and the chairman of its Anthropology Department.

2. I was born in Syracuse and have resided here much of my life. I have been a professor at Syracuse University since 1954 except for four years on a leave of absence to Peru.

3. I have known Donna M. Drake as a friend for over one year, and am familiar with her reputation in this community. She is employed as a teacher and has been for over one year. She has a reputation for honesty, hard work and stability.

Affidavit of William Mangin

4. Donna Drake is married and has two children.

5. It is my opinion and that of others familiar with Donna Drake with whom I have spoken, that she is a reliable, responsible and accountable member of the community.

6. It seems to me that $500 bail is excessive and unnecessary to insure her appearance in court.

WILLIAM MANGIN

Sworn to before me this
28 day of January, 1966.

/s/ DEALTON G. STEVENS

DeAlton G. Stevens, Notary Public in the State
of New York, Onondaga County, No. 34-3843650
My Commission Expires March 30, 1967

People v. Hutchinson Syracuse

OCT 15 1965

13202

October 14, 1965

Hon. Rocco Regitano
City Court Judge
Public Safety Building
511 South State St.
Syracuse, New York

Re: People vs. Edwin Day, Paul Leonard, Robert Lubetsky, John McDowell and Robert Tenney

Dear Judge Regitano:

I am writing to inform you that due to the disposition of Mr. Edwin Day's felony case which was put on for trial on October 25, 1965, I will not, of course, be able to try the charges on Tuesday, October 19, 1965 in your Court on his and the other defendants' cases. These cases were called "ready after" by Mr. Gerber but I am writing you to make absolutely sure that there will be no misunderstanding on Tuesday.

The attorney who will defend Mr. Day on his felony charges, Mr. Richard Frank, is a New York attorney. Mr. Day also resides in New York and they will, therefore, be working together making his defense in preparation for his forthcoming trial. He will be unavailable to me not only as a defendant, but also as a witness. I believe that it would not only be unconstitutional but also immoral, for any defendant to be forced to stand trial in two courts at the same time.

I am also requesting, as counsel for all of the defendants, to be allowed to discuss with the Court and with the District Attorney the order of the forthcoming trials, because I feel that, among other things, the present order is highly prejudicial to the determination of all the cases.

Very truly yours,

Faith A. Seidenberg

s/z
CC: Mr. Edward Gerber
Assistant District Attorney

✓ Mr. Carl Rachlin, CORE General Counsel

Geo. V. Hutchison

October 27, 1965

Faith Seidenberg, Esq.
217A State Tower Building
Syracuse, New York

Dear Faith:

Enclosed are are the memoranda which I hope will be adequate for the cases of

1) Proctor, Sandro, Tenney, deLoach, Hope

2) Freel, McDowell, Monroe, Cooper, and Goldsmith.

The separate pages enclosed should, when coupled with points contained in the memoranda, be more than adequate for the cases of:

1) David Miller

2) Donna Drake, Liz Miller, and Pat Steen.

The cases of Wright and Williams should be covered by the disorderly conduct points contained in the Proctor memo.

Unfortunately, we were unable to complete memoranda in these cases because we did not know all the facts.

Regards to Bob.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs
Encs.

TO: Nancy

FROM: Charlaine

November 9, 1965

Per our conversation of the other day, Mr. Silberberg wants Mr. Farmer to speak on the non-violent nature of CORE, at the Callender trial.

The trial is to be held November 18, 1965; Criminal Court, Room 535, 10:30 A. M.

If you have any further questions, contact Mr. Silberberg, BE 3-7990.

December 13, 1965

Faith A. Seidenberg, Esq.
217 A State Tower Building
Syracuse, New York

Dear Faith:

The Court of Appeals this morning granted our motion for an order extending the time to file appellant's brief in People v. Hutchinson, et al to January 31, 1966. The Court indicated that they would grant no further extensions.

Sincerely,

JDD

James D. Dougherty

cc: Steve Nagler, Esq.

December 23, 1965

Faith Seidenberg, Esq.
217 A State Tower Building
Syracuse, New York

Dear Faith:

Here is the brief which Eleanor Beth wrote for us. I am passing it on without changes although I have serious doubts about the usefulness of her Point I. I would also like to recommend the addition of another point under Thompson v. City of Louisville, 362, US, 199, 206 84S.ct, 624,629(1960), to the effect that the conviction of the appellant upon "no evidence" and was therefore a denial of due process. Bouie v. City of Columbus 378,US,347, 84S.ct, 1697 (1964), to the same effect. It seems clear to me that Roger's conviction was in fact without any legal evidence to support the charge, whatsoever.

I hope to have all of the other briefs for you very shortly (a weasel term).

See you soon,

Cordially,

SMN/cs

STEPHEN M. NAGLER

Re: v. Nutelson

January 5, 1966

Mrs. Faith Seidenberg
217-A
State Tower Building
Syracuse, New York

Dear Mrs. Seidenberg:

Enclosed please find the brief and trial record for The People v. David Miller.

As you will note, in the record, Mr. Gerber, the Prosecutor, made some fatal errors. In his opening remarks he stated that the building was closed to the general public on March 19, 1965. However, he failed to illicit any testimony as to this fact. Assistant Security Director, Blaisdell merely stated that additional security measures were in effect on that day. Neither he nor any other witness that Gerber offered ever stated that the building was closed to the general public, that Miller had attempted to gain entry and was refused, or even that Miller would have been refused had he attempted entry.

The testimony of Richard Kraus merely shows that Miller was first seen in the building in a hallway near the receiving dock area at approximately 2:00 pm. Neither Kraus nor any other witness actually saw Miller enter. They merely placed him near the receiving dock area at that time.

Members of the general public were placed in the customers' service area during the time that the defendant was picketing. In addition, Blaisdell and Lt. Flavin, by their testimony, show that Miller was allowed to remain in the lobby for an hour and ten minutes after he was first asked to leave.

Therefore, the record places this squarely within People v. Lawson decided last spring by the Court of Appeals. Thus, the brief strongly argues the Lawson point.

As you will see in Point II, Section 2036 requires entry with attempt to take possession, which Gerber completely failed to prove.

We have included Point III on quasi-public property to preserve it in the event that this appeal is unfavorable.

We would appreciate a copy of the People's Brief as sonn as it is received, inasmuch as a reply brief will probably be necessary.

Sincerely,

Michael Silberberg for
George Schiffer

MS/vb

Enc:
cc: Carl Rachlin ✓

per Hutcheon

January 28, 1966

James Dougherty, Esq.
1 Wall Street
New York, New York

Dear Jim:

This is the only affidavit that I have received as of this date. I expect to have more coming in by Monday. I will call you then.

Sincerely,

STEPHEN M. NAGLER
Assoc. to General Counsel

SMN/cs
Enc.

per Hutcheon

M E M O

TO: CARL RACHLIN

FROM: FAITH A. SEIDENBERG

DATE: January 20, 1966

Re: David Miller Appeal

Thought you might be interested in seeing attached brief.

Faith

Steve, I am not satisfied - the proposed argument is not clearly cogent. Similarly the entrusion argument is better than Dawson because this was not property of a bank

FEB 2 1966

One Wall Street
New York

February 1, 1966

Stephen M. Nagler, Esq.
CORE
38 Park Row
New York, New York 10038

Dear Steve:

I enclose three copies of Appellants' Brief and Appendix in People v. Hutchinson, et al., filed with the Clerk of the Second Circuit Court of Appeals and served on the District Attorney of Onondago County on January 31. In addition to the twenty-four copies filed with the Court and the three copies served on the Appellee, I ordered eight additional copies, so that I can furnish more copies if you need them. In fact, because I have been remiss in making contact with Brad Brewer, I have decided to send him a copy direct, giving me an opportunity to make proper apology. So you may consider these copies as additional to the one furnished to Brad. I am also sending a copy to Faith, of course.

As I mentioned to you on the phone, Appellee has 20 days to file his Brief and we then have 15 days to file our Reply Brief. I would greatly appreciate any comments and suggestions you may have as to developing and refining these arguments and as to the substance of our Reply Brief.

Many thanks for your assistance--and for your 11th-hour help in obtaining a splendid printer.

Sincerely,

Jim

Enclosures

private nature. The company did not object to his presence until he made a speech from the floor of his placard.

per Mem
Collector

100 Kenyon dr
Nedrow N.Y. 13120

FEB 11 1966

Dear Mr Zagler,

Due to the unprecedented and unforseen weather conditions - e.g. 15 feet snowdrifts and blocked roads etc., I was unable to obtain the character affadavit by the time requested. I will forward it as soon as possible.

Sincerely
Patricia Steen
(Mrs Carl Steen)

Rec. U. Hutchinson

13202

FEB 18 1966

February 17, 1966

Mr. James D. Dougherty
1 Wall Street
New York, N. Y.

Dear Jim:

Under separate cover I have sent you a copy of the District Attorney's brief on the Hutchinson case. I was particularly interested in the last paragraph on Page 8. Their rationale for high bail seems to be that if you can afford it, don't complain. Of course, it seems to me that whether you can afford bail does not in any way negate the principle of its being used to insure ones presence in court.

The rest of the brief seems to me beside the point and in no way refutes our case.

Sincerely,

Faith A. Seidenberg

s:z

CC: Stephen Nagler

Dear Steve,
Enclosed please find two extra copies on the bail series which I had, in accordance with our conversation yesterday.

F.

Hutchinson File
People V. Hutchinson

Jesse Louis Serby, M. D.
3101 SOUTH SALINA STREET
SYRACUSE, N. Y. 13205

TELEPHONE GR 8-1657
IF NO ANSWER GR 4-3961

3-15-66

State Of New York
Co. Of Onondaga,

I, Dr Jesse Serby; physician at 3101 S. Salina St have been a resident of Syracuse continuously for 60 years and have been practicing medicine for 38 years.

I have known Patricia Steen for 20 years and I am familiar with her reputation in the community in which she lives.

In my opinion it is unnecessary for her to post bail as she would appear for trial when requested.

Sincerely,

Jesse L. Serby M.D.

Phillip H. Richards

PHILLIP H. RICHARDS
Notary Public, State of New York
Qualified in Onondaga Co. No. 34-8564370
My Commission Expires Mar. 30, 1966

CLERK'S OFFICE
United States District Court
FOR THE
Northern District of New York

People of the State of New York,
Respondent.

vs.

David Crockett Hutchinson, et al,
Defendants.

Civil Action No. 65-CV-224

There was entered on the docket June 16th, , 19 66

an order (judgment) U.S.C.A. 2nd Circuit affirming order of the U.S. Dist. Court, N.D.N.Y. and Bill of Costs taxed at $50.05 in favor of Respondent against Defendants.

A.O. NO. 145

W. A. Dwyer
, CLERK

One Wall Street
New York

May 31, 1966

Stephen M. Nagler, Esq.
CORE
38 Park Row
New York, New York

JUN 1 1966

Dear Steve:

I enclose a copy of the opinion of the 2nd Circuit, Court of Appeals, in People v. Hutchinson. My best guess is that the Court provided Faith with appellant's free copy.

It was very pleasant getting together Friday.

Best regards.

Sincerely,

Jim

James D. Dougherty

JDD:es
Enclosure

CLERK'S OFFICE
UNITED STATES DISTRICT COURT

OFFICIAL BUSINESS

UTICA
JUN 16
PM
1966
N.Y.

POSTAGE AND FEES PAID
UNITED STATES COURTS

Faith A. Seidenberg
Attorney at Law
217-A State Tower Building
Syracuse, New York 13202

FAITH A. SEIDENBERG
ATTORNEY AT LAW
—
471-8984

217A. STATE TOWER BUILDING
SYRACUSE, N. Y. 13202

JUL 11 1966

July 8, 1966

Mr. Carl Rachlin
General Counsel
CORE Office
38 Park Row
New York, N. Y. 10038

Re: People v. Hutchinson, et al

Dear Carl:

Attached is card from United States District Court showing court costs on above case.

Sorry we couldn't get together in New York. Hope you and your family are well.

Sincerely,

Faith

Faith A. Seidenberg

s:z
encl.

MSS SEDFRE

State of New York vs Lawson, Joseph et al Feb, 1963 - April, 1965 Box 40 Folder 24

(Trespass)

State Historical Society of Wisconsin

Please Retain Original Order

Argued by
CARL RACHLIN

Court of Appeals

OF THE STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVEN CLARKE, and KURT FLEISHER (FLASHER),

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

CARL RACHLIN,
38 Park Row,
New York, N. Y. 10038,
CO 7-6270.

GEORGE SCHIFFER,
40 East 49th Street,
New York, N. Y. 10017,
PL 2-8060.
Attorneys for Defendants-Respondents.

STEPHEN M. NAGLER,
MARVIN KARPATKIN,
PERCY SUTTON,
of Counsel.

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Court of Appeals

OF THE STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVEN CLARKE and KURT FLEISHER (FLASHER),

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

Introductory Statement

It is true that the issue on this appeal is whether or not the Appellate Term properly construed Section 2036 of the Penal Law in reversing the convictions of the Criminal Court. But it is strange that a civil rights case is the case of first impression under this aspect of Section 2036 of the Penal Law. That this section has been stretched out of all meaning in order to meet these acts of the respondents so displeasing to the discriminating realtor, the police, the District Attorney and the Criminal Court, is the position of respondents on this appeal.

Not only did the Criminal Court refuse to acknowledge or to accept evidence of discrimination on these facts, but Judge Gassman, in his opinion, even asserts as a fact "Their actions showed that they had a criminal intent when they entered the office in the first place." Indicative of a criminal intent then are those peaceful efforts made in pursuance

of equal protection of the law guaranteed under the laws of the State of New York. Even the District Attorney, at p. 6 of his brief, makes no such claim and agrees that respondents entered the discriminating realtor's office "lawfully".

Not to be forgotten, as we in fact think so many concerned with the trial did so forget, is the fact that discrimination, such as described herein, is illegal in the State of New York; in a peaceful fashion respondents were attempting to so advise the realtor, the police, the District Attorney and the Criminal Court below, but to no heed. For this reason, high appellate courts such as the United States Supreme Court and this honorable court exist. Cases involving civil rights abound in the high courts of the land because lower courts fail to understand their responsibility under the law or stretch statutes out of all meaning merely because such acts are displeasing rather than criminal.

Additional Facts

To the facts stated by the Appellant, we wish to add the following as being necessary for a proper understanding of the issues herein:

1. After ascertaining the availability of a specific apartment, respondents lawfully entered the premises of the complainant, a real estate office (R. 22-3).

2. That complainant refused to rent the available apartment to respondent Lawson, a Negro, although complainant apparently was willing to rent to respondent, Clarke (R. 23), a white person.

3. That complainant had no regular office hours and was willing to close as late as 9 P. M. (R. 41-2) although on this occasion he stated he wished to close his office at 5 P. M. (R. 32).

POINT I

Section 2036 of the Penal Law applying to unlawful intrusion does not apply to the acts of respondents who entered the premises herein legally.

A. The Deletion by the Legislature of Section 2 of Chapter 396, Laws of 1857, from the Penal Law Proves That the Acts of Respondents in Remaining on the Premises Herein Could Not Be a Crime Under Section 2036

(i) The history of Section 2036 is outlined in *People* v. *Stevens*, 109 N. Y. 159 (1888). The present Section traces its history through Section 467 of the Penal Code of 1881 to its origin in Laws of 1857, C. 396 Sec. 1:

> "An act to punish nuisances and malicious trespasses on land.
>
> Any person who shall hereafter intrude or squat upon any lot or piece of land situated within the bounds of any incorporated city or village without license or authority from the owner thereof, or who shall place therein any hut, hovel, shanty or other structure without such license or authority, or who shall place, erect or occupy within the bounds of any street or avenue of such city . . ., any hut . . . or other structure, shall be deemed guilty of a misdemeanor."

That provision, with the exception that the words "squat" and "trespass" which have been omitted, is in its terms almost the same as the present Section 2036. But Chapter 396 contained additional sections not carried over in the Penal Codes of either 1881 or 1938. Section 2 of Chapter 396 is most relevant to the case at hand. It provided:

> "The owner of any lot or piece of land within the bounds of any incorporated city or village, may give

> notice to any intruder or squatter who may have heretofore intruded or squatted thereon, to quit the same on a day to be specified, which shall not be less than ten days thereafter, which notice may be left upon the premises addressed to the occupant . . . thereof, without specifying their names; and in case such intruder or squatter shall not quit the said premises at or before the expiration of the time specified in such notice, he . . . shall be deemed guilty of a misdemeanor."

When the two sections are read together, it is clear that Section 1 made criminal a wrongful entry to the property and that Section 2 sought the punishment of those remaining on the property of the owner against his wishes, regardless of the circumstances of the original entry.

Although Section 2 no longer appears in the Penal Code of 1881 or thereafter, the concept which it embodies was not lost to the law. In place of Chapter 396, Section 2, a civil remedy against those remaining on land over the objections of the owner was provided by Section 2232 (4) of the Code of Civil Procedure of 1877. This new section provided a summary proceeding for the recovery of possession of real property in cases:

> ". . . where he or the person to whom he has succeeded has intruded into or squatted upon, a parcel of land in a city or incorporated village without the permission of the person entitled to the possession thereof, and the occupancy thus commenced has continued without permission from the latter; or after a permission given by him has been revoked and notice of the revocation given to the person or persons to be removed."

That it was in fact the intention of the legislature to replace Section 2 of Chapter 396 with a civil remedy pro-

vided by Section 2232 (4) was made clear in the New York Code of Civil Procedure, 1881, at page 354, where Commissioner Throop, one of the drafters of the code, states:

> "Subdivision 4 is new. It was suggested by Laws of 1857, C. 396, Secs. 1 and 2 (4 Edm. 617), which make the acts herein provided for a misdemeanor. The owner will be much more effectually protected and restored to his rights by conferring upon him this civil remedy."

The descendants of Section 2232 (4) are Section 1411 (4) of the C. P. A. and Section 713 (3) of the C. P. L. R.

Only two of the cases cited in Appellant's Brief even infer that a legitimate entry followed by a refusal to leave after permission has been withdrawn might fall within the term of Section 2036. These cases [*People* v. *DeStefanis,* 34 N. Y. S. 2nd 52 (1942), and *People* v. *Swald,* 73 N. Y. S. 2nd 399 (1947)] were both prosecutions under Section 722 of the Penal Law, in which Judge Walsh of the Utica City Court held only that the defendants in both cases were not guilty under Section 722. Although Judge Walsh offhandedly stated that the defendant "might well" have been prosecuted under Section 2036, it is clear that he had no occasion to consider the meaning of the statute.

(ii) In fact, as stated above, the term "trespass" was omitted from Section 2036. Although it was included within the titles of the predecessors of Section 2036 [*People* v. *Stevens, supra*] and would be included in Title I, Section 140.05 of the Proposed New York Penal Law, this case arose under a statute which in no way refers to "trespass". Definitions of "trespass," particularly "tort" definitions, such as the ones set forth in Appellant's Brief, page 7, are totally irrelevant. Criminal trespass at common law in New York, was of an entirely different nature and was always more than a mere civil trespass. In *Kilpatrick* v.

People, 5 Dennio 277 (1848), a prosecution for the malicious breaking of windows, the court said:

> "In what respect . . . was this act more than a mere [civil] trespass? It is not alleged to have been done in the nighttime, nor in a secret manner; and it lacks the ingredient of cruelty to a domestic animal which in some cases has been held to change what otherwise would have been a simple trespass into a criminal offense." See also *Loomis* v. *Edgerton,* 19 WEND 419 (1838); *Williams* v. *People,* 24 How 350 (1862); *People* v. *Stevens, supra.*

None of the factors which at common law led to aggravation of a civil trespass into a criminal trespass are even remotely suggested in this case. The simple fact of entry or remaining on land against the will of the owner could certainly not constitute a criminal trespass at common law. Elements of "breach of the peace" have in fact been held to be material elements of the offense, *State* v. *Wheeler,* 3 Vt. 344. In *Barr* v. *City of Columbia,* 84 S. Ct. 1734 (1964) the Supreme Court said:

> "It is one thing to say that a person remaining on another's land after being told to leave may be ejected with reasonable force or sued in a civil action, and quite another to say that he may be convicted and punished as a criminal. The clear distinction between civil and criminal trespass is well recognized in the common law . . . Unless a trespass is committed under such circumstances as to constitute an actual breach of the peace, it is not indictable at common law but is redressed by a civil action only . . . Pre-existing law gave petitioner no warning whatever that this criminal statute would be construed despite its clear language and consistent judicial interpretation to the contrary as incorporating a doctrine found only in civil trespass cases." Accord: *Bouie* v. *City of Columbia,* 84 S. Ct. 1697 (1964).

Also significant is the fact that several states have statutes which explicitly state that either "intruding" *or* "remaining" on property against the will of the owner shall be a crime. [e.g. Louisiana: *Lombard* v. *Louisiana,* 373 U. S. 267 (1963); Florida: *Robinson* v. *Florida,* 378 U. S. 153 (1964).] By removing Section 2 of Chapter 396 of Laws of 1857, the Legislature of the State of New York affirmatively indicated that Section 2036 was not intended to cover "intruding" or "remaining" alternately.

The staff comments concerning the new "real estate crimes" (Art. 1, Proposed New York Penal Law) fully recognize the gap in the present statutes:

> "When a person enters a building unlawfully but with no intent to commit a crime therein, or there is no evidence of such intent, the offense of burglary is not established. In cases where it is not provable that an intruder entered with the requisite intent, appropriate criminal sanctions should be available. The trespass provisions in the existing Penal Law [Sections 1425 (9), 2036] however, are at best ill-defined and narrow in scope [*People* v. *Stevens,* 109 N. Y. 159, 16 N. E. 53 (1888)]. The proposed penal law corrects these deficiencies by presenting in three degrees a new definition of the offense of 'criminal trespass' . . ."

B. Under the Ordinary Definition, to "Intrude" One Must Wrongfully Enter, Which Is Not the Case Here

If, as Appellant's Brief, infers [Appellant's Brief, page 7], "intrude" is an ordinary word in common usage, a few dictionary definitions of the word might be helpful:

> "Intrude—(1) to thrust or force (something) in or upon; esp., to force (oneself) in without leave or welcome." *Webster's New Collegiate Dictionary,* 1948.

> "Intrude—from the Latin "intrudere", to thrust inward. 1.—To thrust or force inward; 2.—To thrust oneself in; come in without warrant or propriety." *New Century Dictionary*

Thus, if "intrude" was used by the Legislature in its ordinary acceptation, Section 2036 deals specifically with people who "come in" wrongfully and not with those who "remain" against the will of the owner.

C. A "Taking of Possession" Is a Necessary Element Under Section 2036

In 1857 and in 1881, the Legislature was quite definite in its use of the word "intrude" rather than "trespass". Certainly in a search for the meaning intended by the Legislature the most logical beginning is the common law as it existed at that time. "Intrude" had definite connotations at common law that could not have been overlooked by the Legislature. *Williams* v. *Alt,* 226 N. Y. 283 (1919).

Intrusion at common law always required a taking of possession. Co. Lit. 277(a) (2d Ed. 1629). The English statute for informations on intrusion [(21 James I C. 14 (1623-4)] was an action by the Crown to recover possession. The defendant was allowed to retain the possession he had at the time of the information until the title was tried and found for the King. *Hulsbury's Statutes of England,* 2nd Ed., Vol. 6, p. 20. In *Birthright* v. *Hall,* 3 Munf. (Va.) 536 (1811), Blackstone is cited (see Gavit, *Blackstone's Commentaries on the Law,* p. 591) and intrusion is defined as:

> ". . . the entry of a stranger after a particular estate of freehold is determined before him in remainder or reversion. The reversioner or remainderman by this act is ousted . . ., and the intruder becomes tenant to the Lord. The reversioner or remainderman however, may purge this intrusion by summary proceed-

> ing without suit, to wit, by a normal and peaceable entry."

Thus, originally an intruder took possession in a special kind of situation and "squatted" on the land.

The common law meaning of "intruder" is reflected in Chapter 396, Laws of 1857, itself. Section 2 of the statute provides a remedy for the owner upon whose land there is an "intrusion" or a "squatting". In *People* v. *Stevens, supra,* the Court said, in comparing Chapter 396, Section 1 and Section 467 of the Penal Code of 1881:

> "The word 'squat' is omitted in the present statute, but it cannot be doubted that in both statutes the Legislature had primarily in view lawless intrusions, . . ."

Furthermore, the unavoidable implication of the provision in Section 2 of Chapter 396 for:

> ". . . notice to any intruder . . . to quit . . . which shall not be less than ten days thereafter . . ."

and the applicability of the section to the successor of the intruder, is that the Legislature conceived of an intruder exclusively as one who took possession

POINT II

The respondents entered and remained on the premises of the complainant under a colorable claim of right which negatives the criminal intent necessary under Section 2036.

Since Section 2036 is a penal statute, a criminal intent must be shown for prosecution. *People* v. *Stevens, supra; Hewitt* v. *Newburger,* 141 N. Y. 538 (1894); *People* v. *Barton,* 232 N. Y. S. 2d 75.

In *People* v. *Barton, supra,* the defendant broke down a door to enter an apartment in which the complainant was the tenant. The apartment was used by a corporation in which both complainant and defendant were officers. Before the incident, complainant informed defendant that he could no longer enter. On appeal, the court held that the defendant had a "colorable basis" for entering, and that this:

> "colorable claim of right—even if it were mistaken —negatives the criminal intent necessary."

In the present case, it is conceded that the respondents entered lawfully a renting office [P. 6, Appellant's Brief] and remained over the objections of the agent. Their purpose was to rent an apartment. Their "claim of right" is derived from Art. 15 Sec. 296 subd. 5 of the Executive Law of the State of New York and Title D1-1.0 of the New York City Administrative Code which make unlawful discrimination on the basis of race in multiple dwellings.

Their failure to withdraw after a subpoena had been served on the complainant, and they had been asked to leave, was fully comprehended by Mr. Justice Frankfurter in his opinion in *Garner* v. *Louisiana,* 368 U. S. 157 (1961) in which he said:

> "Silent persistence in sitting after service is refused could no doubt conceivably exacerbate feelings to the boiling point. It is not fanciful speculation, however, that a proprietor who invites trade in most parts of his establishment and restricts it in another may change his policy."

The failure of respondents to leave constituted a continuing offer to complainant to comply with the laws of the State and City of New York after a subpoena had been served to bring the weight of the law to bear to encourage a change in attitude. The continued peaceful presence of respondents was a conscious reminder to the conscience of

the complainant of the illegal and immoral nature of the conduct which he was pursuing; this continued peaceful presence expressed a hope that complainant would recognize the moral, as well as legal, wrong of his acts and so accept Respondent Lawson as his tenant.

POINT III

Having entered the premises of the complainant lawfully, respondents peaceful conduct therein was "protected speech", and was pursuant to the public policy of the State of New York.

That protected speech includes far more than verbal acts is by now thoroughly established by law. *Edwards* v. *South Carolina,* 372 U. S. 229 (1963).

In *Garner* v. *Louisiana, supra,* Mr. Justice Harlan in his concurring opinion, said that in the absence of a statute:

> "To express the State's overriding interest in prohibiting petitioner's conduct as a clear and present danger to the welfare of the community, peaceful demonstration . . . on private property with the consent of the owner was constitutionally protected."

He divided the defendants in the case into two groups: those who had entered with the "implied consent" of the management and those who had not. The former group, whose position was very similar to that of the respondents in this case, were then pronounced to be exercising "protected speech."

Furthermore, the Legislature of the State of New York has declared that:

> "296. Unlawful discriminatory practices. . . .
>
> 5. (a) . . . it shall be an unlawful discriminatory practice for the owner, . . . or management agent of . . . a housing accommodation, . . .;

> (1) To refuse to . . . lease . . . or withhold from any person . . . because of the race, creed, color or national origin of such person. . . .'' Executive Law, Art. 15, Sec. 296 Subd. 5 (a)(1).

Under Chapter 1, Title D1: Section 1.0 of the New York City Administrative Code, the City Council of the City of New York has said:

> ''. . . It is hereby declared to be the policy of the city to assure equal opportunity to all residents, to live in decent, sanitary and healthful living quarters, regardless of race, color, religion, national origin or ancestry, . . .''

It was under the latter provision that the complainant was served with a subpoena. It was in furtherance of the policies announced in both the State statute and the City ordinance that respondents acted. In *Bell* v. *Maryland,* 378 U. S. 226 (1964), defendants were prosecuted under the Maryland Criminal Trespass Law (Sec. 577 of Art. 27 of the Maryland Code, 1957 Edition) for refusing to leave a diner at the request of the manager. The Maryland State Legislature subsequently passed a statute making it unlawful for an operator of a place of public accommodation to deny service solely because of race. (Art. 49B Md. Code, Sec. 11 (1963 Supp.): Sec. 4) In reversing the conviction the Supreme Court said [at p. 1820]:

> ''A legislature that passed a public accommodations law making it unlawful to deny service on account of race probably did not desire that persons should still be prosecuted and punished for the 'crime' of seeking service from a place of public accommoda-

tions which denies it on account of race." Accord: *Hamm* v. *City of Rock Hill*, 85 S. Ct. 384 (1964).

Respondent respectfully submits that it would seem equally as likely that a legislative body which passed a measure condemning discrimination in housing would not desire that persons be prosecuted and punished for the "crime" of peacefully seeking to obtain housing from a place which denies it on account of race.

CONCLUSION

For all the reasons set forth above, respondents urge the affirmance of the decision of the Appellate Term, reversing the conviction by the Criminal Court of the City of New York.

Respectfully submitted,

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2282 Proof of April 8, 1965
Argued by
JOSEPH A. PHILLIPS

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVEN CLARK and KURT FLEISHER,
Defendants-Respondents.

APPELLANT'S BRIEF

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Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

against *Appellant,*

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVEN CLARK and KURT FLEISHER,

Defendants-Respondents.

APPELLANT'S BRIEF

Statement Pursuant to Rule 5531 CPLR

1. The docket numbers of this case are, 1412, 1413, 1414, 1415, 1416 and 1516-1963.

2. The full names of the original parties are: The People of the State of New York vs. Joseph Lawson, Velma Hill, Vicki Morris, Wesley Sutton, Steven Clarke and Kurt Fleisher (Flasher). There has been no change in the parties.

3. The action was commenced in the Criminal Court, City of New York, County of New York.

4. The action was commenced upon the filing of a sworn complaint on February 14, 1963. Each of the defendants pleaded Not Guilty on February 14, 1963.

5. This is a criminal trespass prosecution pursuant to §2036 of the Penal Law against a group of individuals who refused to leave a real estate office when the owner closed business for the day.

6. This is an appeal by the People of the State of New York from an order of the Appellate Term of the Supreme Court of New York, First Department, entered October 22, 1964, which reversed the judgment of the New York City Criminal Court, New York County rendered May 3, 1963, and dismissed the complaint and information. Leave to appeal to the Court of Appeals was granted by the Hon. Stanley H. Fuld, Associate Judge of the Court of Appeals, on November 13, 1964.

7. The appendix method is not being used on this appeal.

Introduction

The sole issue on this appeal is whether the Appellate Term properly construed Section 2036 of the Penal Law, when it held that §2036 applied solely to unlawful entries. The position taken by the Appellate Term was entirely unanticipated in that the defendants never raised that issue. In any event, history and precedent clearly demonstrate that the Appellate Term was in error, for it is absolutely clear that the criminal trespasses barred by §2036 encompass both the unlawful entry and the unlawful remaining upon the property of another.

THE EVIDENCE

The People's Case

Robert Nieman testified that he was the real estate manager of his wife's apartment building at 50 West 96th Street (20-4).* In a small basement room of that building, he maintains an apartment renting office (20-4). On February 14, 1963 at about four in the afternoon a Mr. Clark approached him about renting an apartment (21-2). Subsequently, Mr. Clark returned and inquired about the vacant apartment which had been discussed the previous day (22). As Clark read the proposed apartment lease, four individuals (including the defendants Hill, Lawson and Morris) entered the office (22-3).

Thereupon, Clark arose and said: "Mr. Nieman, I've decided not to take the apartment and I transfer my rights to Mr. Lawson, here, and I want you to sign a lease with him. I want you to give him the apartment and sign the lease with him" (23).

The witness replied: "you have no right to anything, you have no right to transfer anything * * * And you cannot make me sign a lease with anyone" (23). He then said: "Listen, you have declared that you do not want the apartment. Please leave. Leave this place here" (23).

After that request Velma Hill stated that she represented "CORE" and handed a leaflet to the witness (23-4). When the witness repeated his request that the defendants

* References unless otherwise indicated are to the pages in the printed record.

leave, and refused to rent the apartment to Lawson, he was given a subpoena by a city employee (24-6).

The witness then advised the defendants—"you have seen to it that I have been served with a subpoena. This case will go to court. That is the authority that will decide that, so there is no use to stay around here because it be decided as to the law"; and he then repeated his request four or five times that the defendants leave (20-2). The defendants—two seated and two standing—neither answered nor left the office (28-9).

After about twenty minutes the police were called and the city official left the office saying "well I have to leave now, and you are on your own" (29-30). Approximately fifteen minutes elapsed before the police arrived. In that interval Mr. Nieman again suggested that the defendants leave, noting that there would only be trouble when the police arrived (30). The defendants made no response to the witness' entreaties (30-1).

When the police arrived, they were joined by the defendants Flasher and Sutton (30-1). The police advised the defendants to leave stating "the case is going to the Court; the case must be handled legally, why don't you leave. Why don't you go. You want him to obey the law, why don't you obey the law yourselves" (31-2). None of the defendants replied to the police questioning (31-2).

More police arrived and more requests to leave were ignored (31). Finally at 4:55 p.m. the defendants were told that the renting office closed at five o'clock and they had to

get out by then (31-2). A police officer said: "make up your minds to let this man close his office" (31). At 5:30 p.m. the police told the defendants that they would have to leave or be arrested (31). Again the defendants made no response (31). At about 5:50 p.m. a police wagon arrived and the defendants were arrested (31-2).

Catherine Neiman testified that she owned the building located at 50 West 96th Street (44). She had never given any of the defendants permission to enter or remain in the building (45).

Patrolman **McInerney** testified that on February 14, 1963 he went to the renting office and engaged the six defendants in conversation (47, 49). They stated that they wanted Mr. Nieman to rent an apartment to one of the defendants (49). [The officer's rendition of the subsequent events is similar to that of Mr. Nieman (49-51)].

The Defense

There was no defense interposed.

POINT I

The Appellate Term was clearly in error when it held that §2036 of the Penal Law "makes criminal only an unauthorized entry upon real property."

The statute involved in this appeal is New York's criminal trespass provision [Penal Law §2036]. In part, it provides that: "A person, who intrudes upon any lot or piece of land within the bounds of a city or village, without au-

thority from the owner thereof, * * * is guilty of a misdemeanor''. Although the proposition was not advanced by the defendants, nor briefed below, the Appellant Term held that ''unauthorized entry upon real property'' was barred by the statute, but that unlawfully remaining on real property was not. It concluded that the term ''intrudes'' in §2036 is synonymous and equivalent with the word ''enters.'' Having not a single authority to support such an erroneous conclusion and ignoring a number of lower court cases indicating a contrary result, the court below relies solely upon a suggestion by the Penal Law Revision Commission that §2036 should be reworded and better defined. The fact that the Appellate Term misconstrued the section is ample evidence that the statute might have been better drafted.

In any event the sole issue presented by this appeal is whether §2036 is applicable to a group of defendants who lawfully enter a private renting office and then repeatedly refuse to adhere to the owner's insistant demands that they leave when he wants to close the office at the end of the day. Or more specifically, does §2036 apply to defendants who unlawfully remain on another's property after a demand to leave.

It is apparent that the Appellate Term's construction of the term ''intrude'' is incorrect for a number of reasons. First and foremost it is quite obvious that the legislature never intended that ''intrude'' be the equivalent of ''enter.'' If the legislature intended that §2036 apply solely to unlawful entry, it would have expressly provided for it. The terms ''entry and unlawful entry'' are no strangers

to the statutory law. The entire judicial and legislative history of the burglary statutes shows that "entry" is a word of art [see Penal Law §§400(4), 402, 403; *McCourt* v. *People*, 64 N. Y. 583 (1876)]. Numerous other sections of the Penal Law expressly provide for unlawful entry of one sort or another [see *e.g.*, Penal Law §§405, 1425(5), 2034]. Because of the extensive use of the term "enter" in so many criminal statutes and because of law's long time concern with the concept of entry, it can only be concluded that the term "intrude" in §2036 is not synonymous with entry.

In the second place, §2036 must be construed in light of common law concepts of trespass to real property. When that is done, it is absolutely clear that the statute applies to both the unlawful entry and the unlawful remaining on real property. Section 2036 traces its origin through §467 of the Penal Law to Section 1, Chapter 396 of the Law of 1857 [*People* v. *Stevens*, 109 N. Y. 159 (1888)]. Chapter 396 was entitled "An act to punish nuisances and malicious trespasses on lands" [*id.*]. It has always been the law that "[a] trespass may consist, not only in making an unauthorized entry upon private property, but in refusing to leave after permission to remain has been withdrawn (see Restatement, Torts §158] Prosser on Torts, p. 89)" [*Roger* v. *McCloskey*, 305 N. Y. 75 (1953); *Handleman* v. *Cox*, 181 A. 2d 366 (N. J. 1964); *Boucher* v. *American Bridge Co.*, 213 P. 2d 537 (Calif. 1950)]. In this light, it is absolutely certain that §2036 and its predecessors were concerned with preventing all malicious trespasses—those which arose out of unlawful entry as well as those which arose out of unlawful refusal to leave after a lawful entry.

Thus, it conclusively appears that the Appellate Term's finding that only unlawful entry was proscribed by §2036 is entirely inconsistent with the historically established rules of trespass to real property.

Furthermore, the original description of the section—an act to prevent malicious trespasses—logically commands an interpretation of "intrude" which encompasses both type trespasses—unlawful entries and unlawful refusal to leave. Intruding clearly means maliciously trespassing. Malicious trespasses, of course, are those common law trespasses which are accompanied by a criminal intent [see *People* v. *Stevens*, 109 N. Y. 159 (1888)].

The Restatement's definition of intrude gives additional support to the conclusion that the term "intruder" applies to wrongful remaining on property as well as unlawful entry to it [Restatement, Torts §77b]. Section 77b covers both situations specifically describing an intruder as "one who enters or remains upon" land.

An interpretation of intrude which includes unlawfully remaining on property after a direction to leave is also suggested by a number of judicial precedents and the custom and usage of the trial courts. In *People* v. *DeStefanis* [34 N. Y. S. 2d 52 (1942)], the court indicated that §2036 would apply to a trespass perpetrated by a defendant who refused to leave another's premises after entering to protect his father's property. In *People* v. *Swald* [73 N. Y. S. 2d 399 (1947)], a taxi driver who refused to leave a railroad station was considered a proper subject for §2036. Likewise in *Johnson* v. *May* [189 App. Div. 196 (2nd Dep't,

1919)], the court found that a prima facie violation of §2036 was established when Johnson set up her beach umbrellas and went swimming on May's property and repeatedly refused to stay off the beach. Additional cases which may shed some light on the use of this section are *People* v. *Acee* [15 N. Y. 2d 568 (1964)]; *People* v. *Popack* [14 N. Y. 2d 566 (1964)]; *People* v. *Wilson* [287 N. Y. 786 (1942)]; *People* v. *Barton* [18 App. Div. 2d 612 (1st Dep't, 1962)]; and *People* v. *Fury* [219 App. Div. 747 (2nd Dep't, 1927)]. Each of these cases was decided without opinion but the court's reports may shed additional light on the issue presented here.

Finally and most importantly, the erroneous construction afforded §2036 by the Appellate Term creates the most serious community problems. For it has been proved in this case that without a bona fide reason for doing so, the defendants invaded an apartment renting office and repeatedly refused to leave at the request of the manager. The defendants continued their refusals when the police arrived and declined even to give the police answers to their proper questions. The defendants again refused to leave when they were told that the office had reached its usual closing hour and the manager wished to close the office. At this stage the victim of the intrusion must have recourse to the police and the assistance of the law. The Appellate Term's faulty construction of §2036 gives the victim no alternative but force [Penal Law §246 (3)]. The use of force in such a situation is, of course, entirely and unquestionably undesirable. It, moreover, creates the most substantial danger to the intruder, the victims of the intrusion and the community in general. The fact that the

Appellate Term's construction of §2036 creates such a problem—and leaves individuals without police protection is a clear indication that the interpretation given the statute is grievously ill advised.

Conclusion

The order of the Appellate Term should be reversed.

Respectfully submitted,

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New York County

H. RICHARD UVILLER
JOSEPH A. PHILLIPS
Assistant District Attorneys
Of Counsel

April, 1965

(2282)

Lawson. Brief for Defendants - Respondents

INTRODUCTORY STATEMENT

It is true that the issue on this appeal is whether or not the Appellate Term properly construed Section 2036 of the Penal Law in reversing the convictions of the Criminal Court. But it is stranger still that a civil rights case is the case of first impression under this aspect of Section 2036 of the Penal Law. That this section has been stretched out of all meaning in order to meet these acts of the respondents so displeasing to the discriminating realtor, the police, the District Attorney and the Criminal Court, is the position of respondents on this appeal.

Not only did the Criminal Court refuse to acknowledge and to accept evidence of discrimination on these facts, but Judge Gassman, in his opinion, even asserts as a fact "Their actions showed that they had a criminal intent when they entered the office in the first place." Indicative of a criminal intent then are those peaceful efforts made in pursuance of equal protection of the law guaranteed under the laws of the State of New York. Even the District Attorney, at p. 6 of his brief, makes no such claim and agrees that respondents entered the discriminating realtor's office "lawfully".

Not to be forgotten, as we in fact think so many concerned with the trial did so forget, is the fact that discrimination, such as described herein, is illegal in the State of New York; in a peaceful fashion respondents were attempting to so advise the realtor, the police, the District Attorney and the Criminal Court below, but to no heed. For this reason, high appellate courts such as United States Supreme Court and this honorable court exist. Cases involving civil rights abound in the high courts of the land because lower courts fail to understand their responsibility under the law or stretch statutes out of all meaning merely because such acts are displeasing rather than criminal.

ADDITIONAL FACTS

To the facts stated by the Appellant, we wish to add the following as being necessary for a proper understanding of the issues herein:

1. After ascertaining the availability of a specific apartment, respondents lawfully entered the premises of the complainant, a real estate office (R.22-3).

2. That complainant refused to rent the available apartment to respondent Lawson, a Negro, although complainant apparently was willing to ~~xxxx~~ rent~~xx~~ to respondent, Clarke (R.23), a white person.

3. That complainant had no regular office hours and was willing to close as late as 9 P.M. (R.41-2) although on this occasion he stated he wished to close his office at 5 P.M. (R.32).

POINT I

SECTION 2036 OF THE PENAL LAW APPLYING TO UNLAWFUL INTRUSION DOES NOT APPLY TO THE ACTS OF RESPONDENTS WHO ENTERED THE PREMISES HEREIN LEGALLY.

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A. The deletion by the legislature of Section 2 of Chapter 396, Laws of 1857, from the Penal Law proves that the acts of respondents in remaining on the premises herein could not be a crime under Section 2036.

(i) The history of Section 2036 is outlined in People v. Stevens 109 NY159 (1888). The present Section traces its history through Section 467 of the Penal Code of 1881 to its origin in Laws of 1857, C. 396 Sec. 1: (cap)

> "An act to punish nuisances and malicious trespasses on land.
>
> Any person who shall hereafter intrude or squat upon any lot or piece of land situated within the bounds of any incorporated city or village without license or authority from the owner thereof, or who shall place thereon any hut, hovel, shanty or other structure without such license or authority, or who shall place, erect or occupy within the bounds of any street or avenue of such city ... , any hut ... or other structure, shall be deemed guilty of a misdemeanor."

That provision, with the exception that the words "squat" and "trespass" which have been omitted, is in its terms almost the same as the present Section 2036. But Chapter 396 contained additional sections not carried over in the Penal Codes of either 1881 or 1938. Section 2 of Chapter 396 is most relevant to the case at hand. It provided:

> "The owner of any lot or piece of land within the bounds of any incorporated city or village, may give notice to any intruder or squatter who may have heretofore intruded or squatted thereon, to quit the same on a day to be specified, which shall not be less than ten days thereafter, which notice may be left upon the premises addressed to the occupant ... thereof, without specifying their names;

insert (..) and in case such intruder or squatter shall not quit the said premises at or before the expiration of the time specified in such notice, he shall be deemed guilty of a misdemeanor."

When the two sections are read together, it is clear that Section 1 made criminal a wrongful entry to the property and that Section 2 sought the punishment of those remaining on the property of the owner against his wishes, regardless of the circumstances of the original entry.

Although Section 2 no longer appears on the Penal Code of 1881 or thereafter, the concept which it embodies was not lost to the law. In place of Chapter 396, Section 2, a civil remedy against those remaining on land over the objections of the owner was provided by Section 2232 (4) of the Code of Civil Procedure of 1877. This new section provided a summary proceeding for the recovery of possession of real property in cases:

> "... where he or the person to whom he has succeeded has intruded into or squatted upon, a parcel of land in a city or incorporated village without the permission of the person entitled to the possession thereof, and the occupancy thus commenced has continued without permission from the latter; or after a permission given by him has been revoked and notice of the revocation given to the person or persons to be removed."

That it was in fact the intention of the legislature to replace Section 2 of Chapter 396 with a civil remedy provided by Section 2232 (4) was made clear in the New York Code of Civil Procedure, 1881, at page 354, where Commissioner Throop, one of the drafters of the code, states:

> "Subdivision 4 is new. It was suggested by Laws of 1857, C. 396, Sec. 1 and 2 (4Edm.617), which make the acts herein provided for a misdemeanor. The owner will be much more effectually protected and restored to his rights by conferring upon him this civil remedy."

The descendants of Section 2232 (4) are Section 1411 (4) of the C.P.A. and Section 713 (3) of the C.P.L.R.

Only two of the cases cited in ~~appellant's brief~~ Appellant's Brief even infer that a legitimate entry followed by a refusal to leave after permission has been withdrawn might fall within the term of Section 2036. These cases, [People v. DeStefanis, 34 NYS2nd 52,(1942) and People v. Swald, 73 NYS2nd 399 (1947)] were both prosecutions under Section 722 of the Penal Law, in which Judge Walsh of the Utica City Court held only that the defendants in both cases were not guilty under Section 722. Although Judge Walsh offhandedly stated that the defendant "might well" have been prosecuted under Section 2036, it is clear that he had no occasion to consider the meaning of the statute.

~~By~~

~~[illegible]~~

~~By~~

(ii) In fact, as stated above, the term "trespass" was omitted from Section 2036. Although it was included within the titles of the predecessors of Section 2036 [People v. Stevens, supra] and would be included in Title I, Section 140.05 of the Proposed New York Penal Law, this case arose under a statute which in no way refers to "trespass". Definitions of"trespass," particularly "tort" definitions, such as the ones set forth in Appellant's Brief, page 7, are totally irrelevant. Criminal trespass at common law in New York, was of an entirely different nature and was always more than a mere civil trespass. In Kilpatrick v. People, 5 Dennio 277 (1848), a prosecution for the malicious breaking of windows, the court said:

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~~[illegible]~~

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> "In what respect ... was this act more than a mere [civil] trespass? It is not alleged to have been done in the nighttime, nor in a secret manner; and it lacks the ingredient of cruelty to a domestic animal which in some cases has been held to change what otherwise would have been a simple trespass into a criminal offense." See also Loomis v. Edgerton, 19 WEND 419 (1838); Williams v. People, 24 How 350 (1862); People v. Stevens, supra.

None of the factors which at common law led to aggravation of a civil trespass into a criminal trespass are even remotely suggested in this case. The simple fact of entry or remaining on land against the will of the owner could certainly not constitute a criminal trespass at common law. Elements of "breach of the peace" have in fact been held to be material elements of the offense, State v. Wheeler 3 Vt. 344. In Barr v. City of Columbia, 84 S. Ct. 1734 (1964) the Supreme Court said:

> "It is one thing to say that a person remaining on another's land after being told to leave may be ejected with reasonable force or sued in a civil action, and quite another to say that he may be convicted and punished as a criminal. The clear distinction between civil and criminal trespass is well recognized in the common law ... Unless a trespass is committed under such circumstances as to constitute an actual breach of the peace, it is not indictable at common law but is redressed by a civil action only .... Pre-existing law gave petitioner no warning whatever that this k criminal statute would be construed despite its clear language and consistent judicial interpretation to the contrary as incorporating a doctrine found only in civil trespass cases." Accord: Bouie v. City of Columbia, 84 S.Ct. 1697 (1964).

Also significant is the fact that several states have statutes which explicitly state that either "intruding" or "remaining" on property against the will of the owner shall be a crime. [e.g. Louisiana: Lombard v. Louisiana, 373 U.S. 267 (1963); Florida: Robinson v. Florida, 378 U.S. 153 (1964).] By removing Section 2 of Chapter 396 of Laws of 1857,

the Legislature of the State of New York affirmatively indicated that Section 2036 was not intended to cover "intruding" or "remaining" alternately.

The staff comments concerning the new "real estate crimes" (Art. 1, Proposed New York Penal Law) fully recognize the gap ~~in~~ in the present statutes:

> "When a person enters a building unlawfully but with no intent to commit a crime therein, or there is no evidence of such intent, the offense of burglary is not established. In cases where it is not provable that an intruder entered with the requisite intent, appropriate criminal sanctions should be available. The trespass provisions in the existing Penal Law [Sections 1425 (9), 2036] however, are at best ill-defined and narrow in scope [People v. Stevens, 109 NY 159, 16NE53 (1888)]. The proposed penal law corrects these deficiencies by presenting in three degrees a new definitions of the offense of 'criminal trespass' ..."

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B. Under the ordinary definition, to "intrude" one must wrongfully enter, which is not the case here.

If, as Appellant's Brief, infers, [Appellant's Brief, page 7] "intrude" is an ordinary word in common usage, a few dictionary definitions of the word might be helpful:

> "Intrude-(1) to thrust or force (something) in or upon; esp., to force (oneself) in without leave or welcome." Webster's New Collegiate Dictionary, 1948.
>
> "Intrude-from the Latin "intrudere", to thrust inward. 1. - To thrust or force inward; 2. - To thrust oneself in; ~~&~~ come in without warrant or propriety." New Century Dictionary

Thus, if "intrude" was used by the Legislature in its ordinary acceptation, Section 2036 deals specifically with people who "come in" wrongfully and not with those who "remain" against the will of the owner. ~~Indeed, rather~~

N. J. to printer Copy 1/21 letters

C. A "taking of possession" is a necessary element under Section 2036.

~~People v. Stevens, supra.~~

~~Indeed, other definitions of intrude [illegible] forcibly obtaining possession~~

In 1857 and in ~~1828~~ 1881, the Legislature was quite definite in its use of the word "intrude" rather than "trespass". Certainly in a search for the meaning intended by the Legislature the most logical beginning is the common law as it existed at that time. "Intrude" had definite connotations at common law that could not have been overlooked by the Legislature. Williams v. Alt, 226 N.Y. 283 (1919).

Intrusion at common law always required a taking of possession. Co. Lit. 277(a) (2d.Ed.1629). The English statute for informations on intrusion [(21 James I C.14 (1623-4)] was an action by the Crown to ~~recover~~ recover possession. The defendant was allowed to retain the possession he had at the time of the information until the title was tried and found for the King. Hulsbury's Statutes of England, 2nd Ed., Vol. 6, p.20. In Birthright v. Hall, 3 Munf. (Va.) 536 (1811), Blackstone is cited (see Gavit, Blackstone's Commentaries on the Law,p.591) and intrusion is defined as:

> "... the entry of a stranger after a particular estate of freehold is determined before him in remainder or reversion. The reversioner or remainderman by this act is ousted ..., and the intruder becomes tenant to the Lord. The reversioner or remainderman however, may purge this intrusion by summary proceeding without suit, to wit, by a normal and peaceable entry."

Thus, originally an intruder took possession in a special kind of situation and "squatted" on the land.

The common law meaning of "intruder" is reflected in Chapter 396, Laws of 1857, itself. Section 2 of the statute provides a remedy for the owner upon whose land there is an"intrusion" or a "squatting". In People v. Stevens, supra, the Court said,in comparing Chapter 396, Section 1 and Section 467 of the Penal Code of1881:

> "The word 'squat' is omitted in the present statute, but it cannot be doubted that in both statutes the Legislature had primarily in view lawless intrusions, ..."

Furthermore, the unavoidable implication of the provision in Section 2 of Chapter 396 for:

> "... notice to any intruder ... to quit ... which shall not be less than ten days thereafter ..."

and the applicability of the section to the successor of the intruder, is that the Legislature conceived of an intruder exclusively as one who took possession.

POINT II

THE RESPONDENTS ~~XXXX~~ ENTERED AND REMAINED ON THE PREMISES OF THE COMPLAINANT UNDER A ~~XXXXXXXXXXXXX~~ COLORABLE CLAIM OF RIGHT WHICH NEGATIVES THE CRIMINAL INTENT NECESSARY UNDER SECTION 2036.

Since Section 2036 is a penal statute, a criminal intent must~~h~~ be shown for prosecution. People v. Stevens, supra; Hewitt v. Newburger, 141 N.Y. 538 (1894); People v. Barton, 232 N.Y.S. 2d. 75.

In People v. Barton, supra, the defendant broke down a door to enter an apartment in which the complainant was the tenant. The apartment was used by a corporation in which both complainant and defendant were officers. Before the incident, complainant informed defendant that he could no longer enter. On appeal, the court held that the defendant had a "colorable basis" for entering, this:

> "colorable claim of right--even if it were mistaken--negatives the criminal intent necessary."

~~xx~~ In the present case, ~~xxxxxxxxxxxxxxxx~~ it is conceded that the respondants entered lawfully a renting office [P.6, Appellant's Brief] and remained over the objections of the agent. Their purpose was to rent an apartment. Their "claim of right" is derived from Art. 15 Sec. 296 ~~xx~~ subd. 5 of the Executive Law of the State of New York and ~~xxx~~ Title A sec. D1-1.0 of the New York City Administrative Code which make unlawful discrimination on the basis of race in multiple dwellings.

Their failure to withdraw after a subpoena had been served on the complainant, and they had been asked to leave, was fully comprehended by Mr. Justice Frankfurter in his opinion in Garner v. Louisiana, 368 U.S. 157 (1961) in which he said:

> "Silent persistence in sitting after service is refused could no doubt conceivably exacerbate feelings to the boiling point. It is not fanciful speculation, however, that a proprietor who invites trade in most parts of his establishment and restricts it in another may change his policy."

The failure of ~~defendants~~ respondents to leave constituted a continuing offer to complainant to comply with the laws of the State and City of New York after a subpoena had been served to bring the weight of the law to bear to encourage a change in attitude. The continued peaceful presence of respondents was a conscious reminder to the conscience of the complainant of the illegal and immoral nature of the conduct which he was pursuing; ~~and it expressed a hope~~ this continued peaceful presence expressed a hope that complainant would recognize the moral, as well as legal, wrong of his acts and so accept Respondent Lawson as his tenant.

POINT III

HAVING ENTERED THE PREMISES OF THE COMPLAINANT LAWFULLY, RESPONDENTS' PEACEFUL CONDUCT THEREIN WAS "PROTECTED SPEECH".

That protected speech includes far more than verbal acts is by now thoroughly established by law. Edwards v. South Carolina, 372 U.S.229 (1963).

In Garner v. Louisiana, Supra, Mr. Justice Harlan in his concurring opinion,said that in the absence of a statute:

> "To express the State's overriding interest in prohibiting petitioner's conduct as a clear and present danger to the welfare of the community, peaceful demonstration ... on private property with the consent of the owner was constitutionally protected."

He divided the defendants in the case into two groups: those who had entered with the"implied consent" of the management and those who had not. The former group, whose position was very similar to that of the respondents in this case, were then pronounced to be exercising "protected speech."

Furthermore, the Legislature of the State of New York has declared that:

> "It shall be an unlawful discri... practice for the owner ... , or ...
>
> "296.Unlawful discriminatory practices. ...
> 5. (a) ... it shall be an unlawful discriminatory practice for the owner,... or management agent of... a housing accomodation, ...;
> (1) To refuse to ... lease... or withhold from any person... because of the race, creed, color or national origin of such person...." EXECUTIVE LAW, ART. ... Sec. 296.5.(a)(1).
>
> ... persons." Executive Law, Art. 15, Sec.296(3)(a)

Under Chapter 1, Title D1: Section 1.0 of the New York City Administrative Code, the City Council of the City of New York has said:

> "...It is hereby declared to be the policy of the city to assure equal opportunity to all residents, to live in decent, sanitary and healthful living quarters, regardless of race, color, religion, national origin or ancestry,..."

It was under the latter provision that the complainant was served with a subpoena. It was in furtherance of these policies announced in both the State statute and the City ordinance that respondents acted. In Bell v. Maryland, 378 U.S. 226 (1964), defendants were prosecuted under the Maryland Criminal Trespass Law (Sec. 577 of Art. 27 of the Maryland Code, 1957 Edition) for refusing to leave a diner at the request of the manager. The Maryland State Legislature subsequently passed a statute making it unlawful for an operator of a place of public accommodation to deny service solely because of race. (Art. 49B Md. Code, Sec. 11 (1963 Supp): Sec.4) In reversing the conviction the Supreme Court said [at p. 1820] :

> "A legislature that has passed a public accommodations law making it unlawful to deny service on account of race probably did not desire that persons should still be prosecuted and punished for the 'crime' of seeking service from a place of public accommodations which denies it on account of race." Accord: Hamm v. City of Rock Hill, 85 S.Ct. 384 (1964).

Respondent respectfully submits that it would seem equally as likely that a legislative body which passed a measure condemning discrimination in housing would not desire that persons be prosecuted and punished for the "crime" of peacefully seeking to obtain housing from a place which denies it on account of race.

CONCLUSION

For all the reasons set forth above, respondents urge the affirmance of the decision of the Appellate Term, reversing the conviction by the Criminal Court of the City of New York.

Respectfully submitted

Carl Rachlin
George Schiffer
Attorneys for the Defendants-Respondents

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M.
Stephen Nagler
Marvin Karpatkin
Percy Sutton
of Counsel.

State of New York
Court of Appeals

BEFORE: HON. STANLEY H. FULD, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVEN CLARKE and KURT FLEISHER, (FLASHER),
Defendants-Respondents.

CERTIFICATE GRANTING LEAVE

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §520 of the Code of Criminal Procedure permission is hereby granted to the above named appellant to appeal to the Court of Appeals.

Dated at **New York**, New York
November 13, 1964.

Stanley H. Fuld
Associate Judge

Notice: Within 15 days from the date hereon an appeal must be taken and this certificate must be filed with the notice of appeal. An appeal is taken by filing in the clerk's office having the judgment roll (trial court) a written notice in duplicate that appellant appeals to the Court of Appeals (§522, Code Crim. Pro.) together with proof that another copy of the notice of appeal has been served upon opposing counsel (§521, Code Crim. Pro.). The appeal must be argued within 90 days from the date of the notice of appeal (§536, Code Crim. Pro.)

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVEN CLARKE and KURT FLEISHER (FLASHER),

Defendants-Respondents.

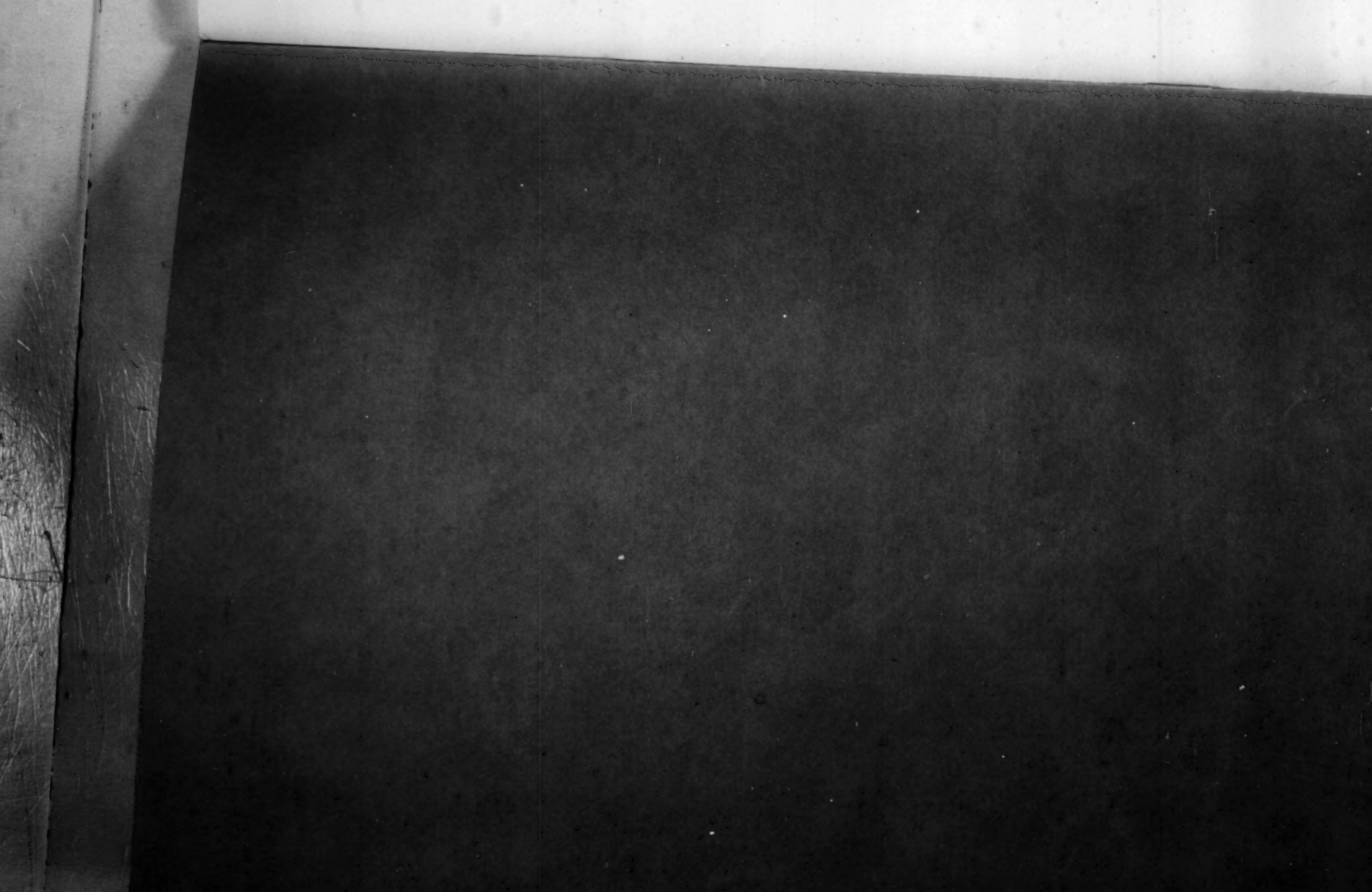
RECORD ON APPEAL

From the Appellate Term, First Department of the Supreme Court of the State of New York

---

FRANK S. HOGAN,
District Attorney, New York County,
Attorney for Appellant,
155 Leonard Street,
New York, New York 10013.

SUTTON AND SUTTON, Esqs.,
Attorneys for Defendants-Respondents,
135 West 125th Street,
New York, New York 10027.



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New York Supreme Court

Appellate Term—First Department

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVEN CLARKE and KURT FLASHER,

Defendants-Appellants.

Statement Pursuant to CPLR 5531

The six (6) Defendants-Appellants were arrested on February 14, 1963, on the complaint of one Robert Nieman and charged with a violation of Section 2036 of the Penal Law in having gone into a real estate renting office located at 50 West 96th Street, in the City and County of New York and having failed to leave at the request of the said Robert Nieman, manager of the office.

The District Attorney of New York County filed a one count information in which each of the Defendants is charged with a violation of Section 2036 of the Penal Law in that on or about the 14th day of February, 1963, the Defendants unlawfully intruded upon a certain lot and piece of land, and a building thereon, at 50 West 96th Street, without authority from the owner.

Each Defendant pleaded not guilty to the information and proceeded to trial on March 11, 1963 in Part 2B of the

Statement Pursuant to CPLR 5531

Criminal Court, New York County, before Judges FRANCIS X. O'BRIEN, BENJAMIN GASSMAN and KENNETH PHIPPS; Judge O'BRIEN presiding.

After trial and submission of briefs by both sides, on March 20, 1963, each of the Defendants were found guilty, as charged, by a 2 to 1 decision of the court; Hon. KENNETH PHIPPS, dissenting and voting to acquit and both the majority and minority wrote opinions.

Each of the Defendants was sentenced to a one year suspended sentence and probation.

The People were represented by Hon. FRANK S. HOGAN, District Attorney, New York County, by ROBERT LEHNER, Assistant District Attorney of New York County. The Defendants were represented by SUTTON & SUTTON, Esqs., by PERCY E. SUTTON and THADDEN WELLS, Esq. There has been no change in parties since the trial.

Notice of Appeal to the Appellate Term from Judgment Dated May 3, 1963

APPELLATE TERM—SUPREME COURT

First Department

The People of the State of New York

against

Joseph Lawson, Velma Hill, Vicki Morris, Wesley Sutton, Steven Clarke and Kurt Flasher,

Defendants-Appellants.

Sir:

Please Take Notice that the above named defendants hereby appeal to the Appellate Term, of The Supreme Court; First Department, from the judgment of the Criminal Court, Part 2B, New York County, made on the 30th day of April, 1963, convicting each of the defendants of the crime of intrusion upon real property, under Section 2036 of the Penal Law; and this appeal is from each and every part of such judgment, together with the sentence of one (1) year in the New York City penetentiary and the suspension thereof.

Dated: New York, New York, May 30, 1963

Sutton & Sutton
Attorneys for Defendants-Appellants
Office & P. O. Address
135 West 125th Street
New York, 27, N. Y.

To:

Hon. Frank Hogan
District Attorney, N. Y. County
Leonard & Centre Streets
New York, N. Y.

Clerk, Criminal Court, N. Y. County
100 Centre Street, New York, N. Y.

Notice of Appeal to the Appellate Term from Judgment Dated May 3, 1963

CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK

Nos. 1412, 1413, 1414, 1415, 1416, 1516

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVENS CLARKE, and KURT FLESHER,

Defendants.

SIR:

PLEASE TAKE NOTICE that the above named defendants hereby appeal to the Appellate Term of the Supreme Court; First Department, from the judgment of the Criminal Court, Part 2B, New York County, made on the 3rd day of May, 1963, convicting each of the defendants of the crime of intrusion upon real property under Section 2036 of the Penal Law and this appeal is from each and every part of such judgment together with the sentence of one

(1) year in the New York City penetentiary and the suspension thereof.

Dated: New York, New York, May 30, 1963.

SUTTON & SUTTON
Attorneys for Defendants-Appellants
Office & P. O. Address
135 West 125th Street
New York 27, New York

To:

Hon. FRANK HOGAN
District Attorney, N. Y. County
Leonard & Centre Streets
New York, New York

Clerk, Criminal Court, N. Y. Co.
100 Centre Street
New York, New York

Certified Copy of Complaint

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 11

State of New York, }
County of New York, } ss.:

Robert Nieman of No. 061-34 st Fairlawn NJ, being duly sworn, deposes and says that on Feb 14 1963, at about 4:40 P.M., at 50 West 96 st in the County of New York State of New York, the defendants, Joseph Lawson, Velma Hill, Vicki Morris, Wesley Sohow, Stevens Clarke, Kurt Flasher did commit the crime of:

violation of sec 2036 of the Penal Law;

under the following circumstances:

Defendants did unlawfully intrude upon real property, without authority from the owner thereof; defendants remaining in deponent's office and refusing to leave.

Sworn to before me,
Feb. 14, 1963

Robert Nieman

L A C
Judge, Criminal Court of the City of New York

I hereby certify that the within is a true Copy of the Record on file at this Court

New York 1-28 1965

A. Godino
Court Clerk

(SEAL)

Endorsements on Complaint

CRIMINAL COURT

OF THE CITY OF NEW YORK

B1412-1416

1516

Part 11

THE PEOPLE OF THE STATE OF NEW YORK

vs.

1. Joseph Lawson m 28
   263 W 13 st NYC
2. Velma Hill f 24
   2075 1 Ave NYC
3. Vicki Morris f 20
   2841 Br 3 st Bk
4. Wesley Sohow m 20
   219 E 12 st NYC
5. Stevens Clarke m 26
   107 W 82 st
6. Kurt Flasher m 34
   165 Hooper St NYC

Defendant arraigned Feb 14 1963

Hon. Cioffi Judge

Mc Inerney 24 pct

Endorsements on Complaint

The defendant on being brought before me was informed of the within charge of violation of

2036 PL

of his right to communicate with relatives or friends by letter or telephone free of charge, of his right to the aid of counsel at every stage of the proceedings and before any further proceedings, of his right to an examination of the charge, of his right to an adjournment to procure counsel or to communicate with anyone and of his right to a trial in a part of the Court held by a panel of three judges.

L. A. C.
Judge.

Defendant pleads Each Not Guilty

Date Feb 14 1963

Louis A. Cioffi
Judge.

Adjourned to Feb. 19 Bail $ P
at Part 1 b ny County

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

Louis A. Cioffi
Judge.

Adjourned to 2/26 Bail $ P

Part 1B Req. of Def.

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

Date 2/19/63 John M. Murtagh
Judge.

Endorsements on Complaint

Adjourned to 3/11 Bail $ P
Final aq def.—1B

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

Date 2/26/63 John M. Murtagh
Judge.

[SEAL]

I hereby certify that the within is a true Copy of the Record on file at this Court

New York 1-28 1965

A. Godino
Court Clerk

Part 2B—Trial

W. B.

A trial before a panel of three judges was ordered on demand by the defendant

W. B.
Judge

Decision and Opinion of Trial Bench

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 2-B

Nos. 1412, 1413, 1414, 1415, 1416, 1516

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVENS CLARKE, and KURT FLASHER,

Defendants.

FRANK S. HOGAN, District Attorney, New York County, (Robert J. Lehner and Joseph A. Phillips, Assistant District Attorneys, of counsel).

PERCY E. SUTTON, O. T. WELLS, and WILLIAM CHANCE, Attorneys for Defendants (George Donald Covington, Oliver C. Sutton and Kenneth Browne, of counsel).

DECISION AND OPINION

March 20, 1963

BENJAMIN GASSMAN, J.

In a one count information filed by the District Attorney of New York County, each of the defendants is charged with a violation of Section 2036 of the Penal Law. The in-

formation alleges that on or about the 14th day of February, 1963, the defendants unlawfully intruded upon a certain lot and piece of land, and a building thereon, at 50 West 96th Street, in the City and County of New York, without authority from the owner.

Upon the trial, the complainant, Robert Nieman testified that on the 14th day of February, 1963, he maintained a real estate management office at 50 West 96th Street, New York City, a 16 story apartment building owned by his wife; that such office, about 18 feet by 20 feet was located in the basement of said building and was accessible either through the service entrance or through stairs leading from the lobby. That on February 13, 1963, the defendant Stevens Clarke spoke to him about renting an apartment, No. 1-B in premises 78 Manhattan Avenue, New York, which was managed by the complainant, and that the said defendant made an application for the rental of said apartment.

He testified further that on February 14, 1963, at about 3:45 P.M. the defendant Clarke came into his office and inquired whether that apartment was still vacant, and was told that it was. Defendant Clarke then asked the complainant to show him a form lease. Nieman showed him a form of lease, which Clarke perused for a period of 3 to 5 minutes; that while Clarke was reading that lease, the defendants Joseph Lawson, Velma Hill and Vicki Morris entered the office together with another man, later identified as Mr. Quinones. The defendant Clarke then told the complainant that he decided not to take that apartment and that he transferred his rights to that apartment to the defendant Lawson. Nieman then told Clarke that he had no right to transfer any apartment. It should be noted at this point that the defendant Clarke is white and that the defendant Lawson is colored. The defendant Velma Hill then told the complainant that she represents "CORE"

and she handed several leaflets to him, one of which is in evidence as People's Exhibit 1. Nieman asked the said four defendants to leave the office, but they refused to do so. At that point, the man, identified as Quinones asked the complainant whether he refused to lease the apartment to defendant Lawson, and when Nieman replied that he did, Quinones served a subpoena upon him. Nieman told Quinones that he was surprised to see a City official taking part in such a demonstration. Nieman again requested the said four defendants to leave his office, but they refused to do so and remained there. Quinones, however, left the office, saying to the said four defendants that they were on their own.

Nieman called the police and Patrolman McInerny arrived in about 10 minutes. In the meantime, the defendants Wesley Sutton and Kurt Flasher entered the office and exchanged greetings with the other four defendants. Nieman showed the subpoena to the police officer and told him that he wanted the defendants out of his office. The police officer told the defendants: "Now that the case is in court, why don't you go? You want others to obey the law, why don't you?" The defendants made no reply but remained in the office. Nieman told the defendants that it was after 5 P.M. and that he wanted to close the office, but the defendants refused to leave. At about 5:50 P.M. more police officers arrived and the defendants were arrested.

Kate Nieman, the wife of Robert Nieman testified that she was the owner of 50 West 96th Street, and that she did not give permission to any of the defendants to enter the said premises.

Patrolman John McInerny testified that, pursuant to a call, he arrived in complainant's office at about 4:40 P.M. on that day. He found the six defendants in the office. Nieman showed him the subpoena and told him that he

wanted the defendants to leave the office. The police officer told the defendants that they had no right to remain there and that they should leave. He repeated that request to the defendants four times. He remained in that office about 45 minutes and then, at Nieman's request, arrested the defendants.

The defendants rested at the end of the People's case without offering any testimony.

The defendants contend that Section 2036 of the Penal Law does not apply to this case. They urge in their brief that "nowhere in the reading of Section 2036, or the cases decided thereon, is there clear authority for the People's contention that the unauthorized entry onto property itself and remaining thereon against the wishes of the owner, but without exercising domain or control, or use of the property, is a criminal trespass".

Such contention is without merit. We find, as a fact, that the defendants entered the complainant's office in a group; that they insisted on remaining there and did remain there for about two hours against the complainant's wishes. Such action was tantamount to intrusion upon complainant's premises unlawfully.

While research failed to disclose any decision in this State exactly in point, we conclude, nevertheless, that in acting as they did, the defendants violated both the letter and the spirit of Section 2036 of the Penal Law. That section, insofar as it applies to this case, provides that "a person, who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof, * * * is guilty of a misdemeanor". The words "lot or piece of land" used in the statute, have been interpreted as including buildings on such lot or piece of land. (*People* v. *Leiby*, 184 Misc. 21, 52 N. Y. S. 2d, 493). The word "intrude" means to unlawfully enter upon land

or buildings or premises of another, by a person without authority, and remaining there against the wishes of the owner thereof.

When the defendants entered the complainant's office in a body and persisted in remaining there for over two hours against his wishes, disregarding his statement to them that he wished to close the office, they intruded upon his property. If their purpose in first entering that office was to force or induce the complainant to lease an apartment to defendant Lawson and, on failure thereof, to have a subpoena or other process served upon complainant, their purpose was concluded when the subpoena was served by Quinones. Their remaining in that office thereafter and their refusal to leave the office, when requested to do so by complainant and by the police officer, constituted an unlawful intrusion.

Apparently conceding the facts as testified to by the People's witnesses, the defendants nevertheless urge that they are not guilty of unlawful intrusion. They state in their brief that in enacting Section 2036 of the Penal Law "the legislature did not intend to enact a law to apply to a *temporary unauthorized* entry by a person onto the premises of another". They argue that—intrusion to be actionable—"must be an encroachment onto property of another accompanied by some degree of permanency of intrusion". We do not accept that argument. What was the complainant expected to do under the circumstances: Was it expected of him that he walk out of his own office and leave the defendants in occupancy thereof? Or should he have remained in his office—against his will—until such time as the defendants made up their minds to leave? At what point would the "temporary unauthorized entry" become "an encroachment by some degree of permanency of intrusion"? Is the law so impotent that it cannot redress

a wilful wrong? The answer to these questions is obvious. The complainant did what the law gave him a right to do, that is arrest the defendants and charge them with unlawful intrusion.

Whether the complainant was right or wrong in refusing to lease an apartment to defendant Lawson, is beside the point. Perhaps he may have refused to do so because Lawson was colored. We do not adjudicate that question here, for such adjudication is not necessary to a decision of this case. Apparently, the defendants felt that the complainant was guilty of discrimination, for they invoked the law by causing process to be served upon him. Having invoked the law against the complainant, they should have displayed the same respect for the law that they wanted the complainant to display. They had no right to take the law into their own hands and seek to overwhelm the complainant by sheer force of numbers. Their actions showed that they had a criminal intent when they entered the office in the first place. Under the circumstances, they unlawfully intruded upon complainant's premises.

In *People* v. *Stevens,* 109 N. Y. 159, 162, decided in 1888, the Court of Appeals traced the historical background of Section 2036 of the Penal Law. That section was enacted in 1881 (Ch. 676, Laws of 1881) and was a re-enactment of Section 467 of the Penal Code (Ch. 396, Laws of 1857) entitled "An act to punish nuisances and malicious trespasses on lands". Section 467 of the Penal Code provided that "any person who shall hereafter intrude or squat upon any lot * * *". In enacting Section 2036 of the Penal Law, the legislature omitted the word "squat", but except for that omission, embodied the old Section 467 into Section 2036. The court in the *Stevens* case (supra) at page 162, said: "The word 'squat' is omitted in the present statute, but it cannot be doubted that in both statutes the

legislature had *primarily* in view lawless intrusions, *especially* on vacant lands in cities and villages without the knowledge of the owner. Intrusion on any lands in cities and villages, vacant or not, is doubtless within the statute. The statute, construed in view of the pre-existing law, was *primarily* intended to define what was previously known in the criminal law as a criminal trespass, as distinguished from a mere civil trespass". (Emphasis added.)

The defendants would have this court substitute the word "exclusively" for the words "primarily" and "especially", used by the Court of Appeals in the *Stevens* case. We read the *Stevens* case as holding that a lawless intrusion, whether on vacant land or on any part of a building thereon, constitutes a violation under Section 2036 of the Penal Law. In more recent times (1942), in a case involving a defendant charged with disorderly conduct for refusal to leave a private apartment after being ordered to leave by the occupant of that apartment, the court, in dismissing the disorderly conduct charge, at the same time said: "It may well be that the defendant was a trespasser on the premises and could have been removed by force, if necessary, by the complainant or the police officer at her request, *or have been prosecuted under Section 2036 of the Penal Law for unlawful intrusion on real property*". (*People* v. *De Stefanis,* 34 N. Y. S. 2d, 52, 53, emphasis supplied).

Accordingly, we find that the guilt of the defendants was established beyond a reasonable doubt. The motion of each defendant, made at the conclusion of the case, to dismiss the information, is denied as to each defendant, and each defendant is found guilty as charged.

B GASSMAN
Benjamin Gassman, Judge

O'BRIEN, P. J. concurs.
PHIPPS, J. dissents.

Dissenting Opinion of Trial Bench

CRIMINAL COURT OF THE CITY OF NEW YORK

Trial Part 2-B

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVENS CLARKE, and KURT FLASHER,

Defendants.

FRANK S. HOGAN, District Attorney, New York County, (Robert J. Lehner and Joseph A. Phillips, Assistant District Attorneys for the defendants, (George Donald Covington, Oliver C. Sutton and Kenneth Browne, of Counsel, on the brief).

DISSENTING OPINION

March 20, 1963.

KENNETH M. PHIPPS, Judge:

I dissent and vote to acquit. After reading the briefs of counsel for the People and Counsel for the defendants, and privately researching the issue involved, and thereafter reflecting on the thinking of my colleagues in this matter, I am convinced that Section 2036 of the Penal Law is not applicable to the facts of this case.

Dissenting Opinion of Trial Bench

In voting to dismiss, I am guided by the purposes and the background for the enactment of Section 2036, and its antecedent statutes. This is not to say that I am of the opinion that the defendants are blameless of any offense, but rather that their offense is not a violation of section 2036 of the Penal Law, with which they are charged; accordingly the motion of defendants' Counsel should be granted, and each of the defendants acquitted.

KENNETH M. PHIPPS
Kenneth M. Phipps, Judge

Minutes of Trial

CRIMINAL COURT OF THE CITY OF NEW YORK

BOROUGH OF MANHATTAN—PART IIB

Violation 2030 Penal Law

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH LAWSON, VELMA HILL, VICKIE MORRIS, WESLEY SUTTON, STEVEN CLARKE and KURT FLASHER

100 Centre Street
New York 13, New York
March 11, 1963

Before:

Hon. FRANCIS X. O'BRIEN, Presiding
Hon. BENJAMIN GASSMAN
Hon. KENNETH PHIPPS

Appearances:

For the People:
Hon. FRANK HOGAN, Esq.
District Attorney New York County
By: ROBERT LEHNER, Esq.

For the Defendants:

SUTTON & SUTTON, Esq.
135 West 125th Street
New York, N. Y.
By: PERCY SUTTON, Esq.
and
THADDEUS WELLS, Esq.
305 Broadway
New York, N. Y.

John H. Green
Official Court Reporter

Bridgeman: Docket No. B-1412. Joseph Lawson, Velma Hill, Vickie Morris, Wesley Sutton, Steven Clarke and Kurt Flasher.

Defendants' Attorney: I make a motion to amend the name Sohow to Sutton, Wesley Sutton. The papers should be technically amended to read that way, Sutton.

Mr. Justice O'Brien: Both sides ready? Defendants plead "Not guilty."

Defendants' Attorney: Yes, sir.

The People's Attorney: The People call Robert Nieman.

ROBERT NIEMAN, the complainant herein, residing at 61-31st Street, Fairlane, New Jersey, first having been duly sworn, testifies as follows:

Direct examination by Mr. Lehner:

Q. What is your business or occupation? A. I'm a real estate manager.

Q. Where is your place of business? A. At 50 West 96th Street.

Q. And is that in the County of New York? A. Yes.

Q. Where in the premises do you maintain your offices? A. In the basement.

Q. And how does one get to the basement, your basement? Is an office in the premises? A. You come down, it is a service elevator, or walk a step down the service entrance steps.

Q. Well, when you walk, how do you get in from the street? A. Two ways, service entrance. Stairs or service elevator, brings you down in the basement to the lobby.

Q. Your office is in the basement part of that building, is that correct? A. That is right.

Q. How can you describe your office, the location of the inside of the basement where it is? A. The office is in the back of the building, around about 18 by 20.

Q. And where is it in relation to the door leading from the street say as you go from the service entrance to the street, how would you get to your office in the basement? A. You enter the house and walk through some room and then you come to the office.

Q. And you say approximately the size of your office is what, sir, 18 x 20? A. Yes.

Q. Eighteen by 20, you say? A. Yes.

Q. What kind of furniture do you have in this office? A. I have a table, three chairs, some bookcases and some shelves with materials.

Q. Is it out of this office that you rent apartments? A. I do.

Q. Is 50 West 96th Street an apartment building? A. Yes.

Q. And your office is in the basement? A. Yes.

Q. Who is the owner of that apartment building? A. The owner of the apartment building is my wife.

Q. Now, on February 14, 1963, did you have occasion in the afternoon to see one of the defendants? A. Yes.

Q. What was that occasion?

Mr. Justice O'Brien: What was that date?

The People's Attorney: February 14, 1963.

Q. What is the approximate time you saw one of the defendants? A. A quarter to four in the afternoon.

Q. Which defendant was that? A. Defendant Clarke.

Mr. Justice O'Brien: Clarke?

The People's Attorney: Clarke.

Mr. Justice O'Brien: Who is Clarke?

Voice: I am Clarke.

Q. Is that the gentleman that you saw? A. Yes.

The People's Attorney: Indicating Steven Clarke.

Q. Now, where did you see this gentleman? A. He came to the door, stood at the door and asked questions.

Mr. Justice O'Brien: The door of your office?
The Witness: It was open.

Q. The door of your office was open? A. Yes.
Q. And he came to the entrance of your office? A. Yes.
Q. Where were you at that time? A. I was sitting behind the table.
Q. Was there anybody else in the office at that time? A. No.
Q. What happened at that time that he first came to your office on that day? A. He said that an apartment which was vacant, was still vacant—is the apartment still vacant?
Q. And what did you reply? A. I said yes.
Q. What did he say next? A. Then he said, can I see a lease which has to be signed by the tenant which you use in your business?
Q. What happened next? A. I reached back and I got a lease and handed it to him, and he sat down and started to read it.
Q. After he perused the lease, that you gave him, what happened next? A. Approximately four minutes, maybe five minutes, four persons came to the opened door in the office.
Q. And do you see any of the persons here today? A. Yes, I do. I see three of them.
Q. And what three are they? A. Mr. Lawson, the lady next to him and the lady next to her.

Mr. Justice Gassman: That is Lawson, Hill and Morris?

The People's Attorney: Yes, in that order.

Mr. Justice Gassman: They came into the office?

The Witness: They came into the office, yes.

Q. Did they come in there, you say, these four persons, is that correct? A. Those four persons.

Q. Who is the fourth person? A. The fourth person identified himself by a card, his card.

Mr. Justice O'Brien: I didn't get that.

The People's Attorney: Identified himself by a card.

Mr. Justice O'Brien: He is not here now?

The Witness: I don't see him.

Mr. Justice O'Brien: Very good, proceed.

Q. What happened at that time? A. Mr. Clarke stood up and said, "Mr. Nieman, I've decided not to take the apartment and I transfer my rights to Mr. Lawson, here, and I want you to sign a lease with him. I want you to give him the apartment and sign the lease with him.

Mr. Justice Gassman: With whom?

The Witness: Mr. Lawson.

The People's Attorney: Indicating Defendant Number One.

Q. Continue, what happened next? A. I said, "You have no right to anything. You have no right to transfer anything." I said, "And you cannot make me sign a lease with anybody."

Q. Continue. A. Well, then I said, "Listen, you have declared that you do not want the apartment. Please leave. Leave this place here.

Q. Who were you talking to at that time? A. All of the people.

Q. That would be Mr. Clarke

Mr. Justice Gassman: Mr. Lawson, Hill and Morris, is that right?

The Witness: Yes, yes.

Q. Continue. A. One of the defendants.

Q. Which one? A. Lady with the red coat.

Q. That is Velma Hill?

Mr. Justice O'Brien: The lady with the black dress?

The Witness: Yes.

Mr. Justice Gassman: Velma Hill?

The Witness: Yes. She said that she represented CORE and she handed me a leaflet from CORE.

Q. Now I show you this leaflet and ask you is this the leaflet that you were handed? A. That is one of the leaflets which was handed to me, where I put on the remarks down, yes.

The People's Attorney: I offer this pamphlet in evidence, your Honor, if there is no objection, it will be People's Exhibit #1.

Q. Was that writing on there? A. That was not on it, I put that on myself.

The People's Attorney: Indicating a pencil mark on the back of the leaflet which the complainant says he put on and it was not present at the time he received it. May I have it marked?

Defendant's Attorney: May I see it?

The Court: No objections, Counsellor?

Defendants' Attorney: No. If your Honor please, may the record indicate that the penciled notation on People's Exhibit #1 for identification states and it is written in this way, "Section 2036 Penal Law, intrusion—Penal Law. The person who intrudes without permission of the owner—"

Mr. Justice Gassman: It is not in evidence, this leaflet. Mr. Sutton?

Defendants' Attorney: Just for the record, your Honor, please, my name is Wells.

Mr. Justice Gassman: I apologize.

Defendants' Attorney: It is my understanding that that portion is not in evidence.

Mr. Justice Gassman: We're not going to read anything that is not printed on there.

Q. After this defendant handed you this piece of information, this pamphlet, what happened next? A. I ask them again to please leave my office.

Q. Who did you ask that time? A. I asked all of them.

Q. You asked the group? A. Asked the group.

Q. Did you receive any response? A. None.

Q. What happened next? A. Then one of the men, a Quinnones—

Mr. Justice O'Brien: Mr. Who?

Q. The man who is not here? A. No, he is not here, he reached in his pocket and took out a paper, and he said, "Well, I have a subpoena for you here, and he handed me a paper, a subpoena. I opened the paper and I saw it was an official paper from the City of New York and I told him, "I am astonished that a City Official of the City of New York takes part in an action here." Mr. Quinnones then

asked me, "Are you refusing to rent the apartment to this man?" I said, "Yes, I refuse." Then he reached in his pocket and—

Defendants' Attorney: The records should indicate the person to whom he is referring to when he says he refused to rent the apartment to. I would like the record to indicate to whom he was referring when he said that man.

The Witness: To Mr. Lawson.

Q. Mr. Lawson? A. Mr. Lawson.

Q. When you said, "yes" did anything happen then? A. He reached into his pocket and handed me the subpoena.

Q. Continue, what happened next? A. Then I told him, when I looked at it and I saw it an official paper from the City of New York, I said, "I am very much astonished that an official of the City of New York takes part in this demonstration here by these people here."

Q. I show you this, may I have this marked for identification.

Q. I show you this piece of paper and ask have you seen it before? A. Yes.

Q. What were the circumstances under which you saw this paper? A. That was the paper which was handed to me by this man.

Q. Mr. Quinnones?

Defendants' Attorney: I'm going to have to object. This did not come from one of the defendants, did it?

The People's Attorney: That is the testimony.

Defendants' Attorney: No, one of the defendants on trial.

The People's Attorney: That is the testimony.

Defendants' Attorney: No, one of the defendants on trial. I would have to object to this document.

Mr. Justice O'Brien: You're offering this in evidence, are you?

The People's Attorney: I'm planning to, yes, your Honors.

Mr. Justice O'Brien: You object to it Mr. Sutton?

Defendants' Attorney. Yes sir.

The People's Attorney: May I state my reasons for offering it?

Mr. Justice O'Brien: Yes.

The People's Attorney: It is my contention that the crime of unlawful intrusion on real property requires a criminal intent. It is unlawful intrusion on the real property without materiality of the owner and I am introducing this piece of evidence which was handed to the complainant during the alleged crime as showing intent on the part of these defendants to remain in the particular area in that they did have a grievance against this particular complainant. There is no mistake that they were there and they did personally remain upon the premises.

Mr. Justice O'Brien: Objection sustained.

Mr. Justice Gassman: By the way, Mr. District Attorney, this charge is what, 2036?

The People's Attorney: Twenty thirty-six.

Mr. Justice Gassman: Go ahead.

Q. After you had that conversation with Mr. Quinnones, what happened next? A. I did not know the name of the man, I asked him for his name. He stated his name is—I

didn't understand it. I asked him for a card and he gave me his card with his name who he represents.

Q. Continue, what happened next? A. Then I talked to the defendants and I said you have seen to it that I have been served with a subpoena. This case will go to the Court. That is the authority that will decide that, so there is no use to stay around here because it will be decided as to the law, I said, "please leave now" and I repeated that.

Mr. Justice Gassman: Did they leave?

The Witness: They did not leave.

Q. Did they respond to that, what did they say to that? A. They did not respond.

Q. What happened next, how many times did you ask them to leave? A. Four or five times.

Q. What happened next? A. After that I said, "well, if you refuse to leave, I will have to call my attorney and find out what to do." I called my attorney; I stated what happened—

Q. Don't give us the conversation with your attorney, but after speaking to your attorney, did you do something? A. Yes, I called a police.

Q. Now, prior to getting into that, will you please tell where the defendants were in relation to your office which you say was something like about 18 x 20 feet?

Defendants' Attorney: May I just interrupt here and ask that any people who may identify here be excused from the Court Room.

Mr. Justice O'Brien: May we do that. All witnesses on both sides of the case are excused from the Court Room. Mr. Wells, do you have any witnesses?

Defendants' Attorney: I'm Counsel to Mr. Sutton.

Q. Can you tell us where these four defendants were situated in your business office? A. Yes, I was on one side of the table and they were on the other, and these two women had sat down on the chairs, and the men were standing.

Q. Did they remain in that position? A. They did.

Q. After speaking to your attorney, did you say you called the police? A. That is right.

Q. Now, approximately how much time elapsed from the time that the four defendants were in your office to the time you called the police? A. Twenty minutes, I would say twenty-five minutes.

Q. And during that time, you asked the defendants to leave about four times, is that correct? A. Yes.

Q. Was Mr. Quinnones still in your office at the time you called the police? A. Yes.

Q. After you called the police, what happened next? A. Then after a short interim, Mr. Quinnones said, "well, I have to leave now."

Defendants' Attorney: Unless this was made in the presence of the defendant, I would object to any statement that was made.

The Court: Was it said in the presence of the defendants?

The Witness: Yes, the defendants were all present, and Mr. Quinnones was present, and Mr. Quinnones said, "well, I have to leave now, and you are on your own," addressed to the defendants.

Q. Approximately—withdraw. What happened next? A. Approximately ten to 15 minutes elapsed before the police came.

Q. Did anything happen within the ten to 15 minutes when Mr. Quinnones was leaving? A. During that time talk went on, yes.

Q. What was that talk? A. Talk went on again and I asked him if they would leave and I said, you have no reason to stay here, why don't you go. Please the police is coming and it will be more trouble.

Q. Anybody did say anything to you? A. Nobody said anything.

Q. After the police arrived, what happened? A. When the police arrived, well they asked what was going on?

Q. How many defendants were there, when the police arrived? A. They were four there.

Q. Four? A. Yes.

Q. Who left? A. Mr. Quinnones had left.

Q. The defendant Clarke? A. Clarke.

Q. Lawson? A. Yes.

Q. Hill? A. Yes, they were all there.

Q. They were all there? A. Yes. Mr. Quinnones had left.

Q. Now, when the officers arrived, did they arrive with anyone else? A. Yes, they arrived with two additional men who came into the office.

Q. Who were those two? A. They are the gentlemen next to the lady and the gentleman on the end—

Mr. Justice Phipps: Indicating, what are their names?

Voice: Rabbi Flasher and Wesley Sutton.

Q. Defendants Sutton and Flasher, is that right? A. Yes.

Q. What happened at that time? A. They exchanged greetings with the defendants and stood with them together.

Q. Who exchanged greetings? A. The two new arrivals.

Q. When you say the two new arrivals, you're referring to Sutton and Flasher is that right? A. That is right.

Q. And could you tell us what that exchange was; can you recall what they said? A. They greeted each other, I don't know.

Q. They greeted each other, what happened at that time? A. They—the officer asked what is going on, and I told them what was there and I showed them the subpoena.

Mr. Justice Gassman: You showed them the subpoena to Sutton and the others?

The Witness: No, to the police officers.

Q. What happened then? A. The police officers talked to the man—with the people and told them also that they saw this man was served with a subpoena, this case is going to the Court; the case must be handled legally, why don't you leave. Why don't you go. You want him to obey the law. Why don't you obey the law yourselves. Why do you have this trouble. Nobody answered. More policemen came. Other people asked them to leave.

Q. I didn't hear that. A. Other policemen asked them to leave.

Q. Was there any response from the defendants? A. There was never any response from them. Then the policemen asked me what time do you close your office. When do you go home? I said five o'clock.

Q. He said, that's only five minutes and turned to the defendants and said, "make up your minds to let this man close up his office." "Leave the place." But nobody left and time went on and it was about half past five when the policeman told them they would have to leave now or else I'll have to arrest you, and there was no response. So the policeman told them, "well I'll have to call for a

wagon to take you away and have you arrested." There was no response, the people refused to leave.

Q. You say you ordinarily close at 5 P.M.? A. Yes, I close at 5 P.M.

Q. You made that known to the defendants, is that correct? A. I told the policeman and he said, "you heard what the man said, you want to leave so he can close up his office. You're keeping him from leaving."

Q. What happened at 5:30? A. At 5:30 the police called up for a wagon for to send the wagon down for them. There were two women and four men.

Defendants' Attorney: I'm going to have to object. I believe he's testifying to a conversation with the police by telephone.

Q. In the meantime was there a police call?

Mr. Justice O'Brien: Just a minute.
The People's Attorney: Withdrawn.

Q. And did there come a time you told the police you wanted these people arrested? A. Yes.

Q. And did the police arrest these people? A. They did arrest them.

Q. The six defendants, is that correct? A. That is right.

Q. That was approximately 5:30 you say? A. It was about ten minutes to six, I would say.

Q. Had you given permission to any of these six people to remain in your premises? A. No.

Q. Now this subpoena you received from Quinnones? A. Yes.

Q. Was that from Mr. Lawson against you?

Defendants' Attorney: Objection.

The Court: Sustained.

The People's Attorney: Your Honor, in view of the testimony elicited, the offer of the exhibit, plus the statement that I think it would be the intent of the defendant since this is a crime, demanding intent, intentionally intruded onto the property. The exhibit itself would indicate the proof to be a material issue as to whether or not there was intent on the part of the defendant to stay in this particular premises.

Mr. Justice Gassman: Tell me of what materiality is the subpoena? Now the testimony here is that the six defendants came into the complainant's office wthout a subpoena and remained there all that time. He asked them to leave, what difference does it make whether he was served with a subpoena or not. The subpoena does not shed any light one way or the other.

Mr. Justice O'Brien: Objection sustained.

The People's Attorney: You may inquire.

Cross-examination by Mr. O'Brien:

Q. Mr. Nieman, who were the first persons that came to your office? A. Mr. Clarke.

Q. Who was the first person that you saw? A. Who came in?

Q. Yes? What did he say to you when he came in? A. He stood in the door frame, he said, "is that apartment still vacant."

Q. Had you talked to him before that? A. I did.

Q. When? A. The day before.

Q. In what time of the day had he come in? A. He came in I would say at 3:30, 4 o'clock.

Q. Were you there alone? A. I was alone then.

Q. And by the way, that office is, a management office or is that a real estate office? A. It is a superintendent's, superintendent's office, my office.

Q. And the people who want to rent— A. Come there to the office.

Q. I see—and they come in and go? A. And go.

Q. They conduct business there with you? A. Yes.

Q. Can anybody come in? A. Anybody can come in.

The People's Attorney: Objection.

The Court: Overruled. He answered it.

Q. That is open to the public to come in, sir?

The People's Attorney: Objection, your Honor?

Mr. Justice O'Brien: Your form is bad Counsellor?

Q. Can anyone—

Mr. Justice O'Brien: People who have legitimate business, I presume? A. Yes.

Q. And can anyone who wishes to rent one of your apartments come there? A. They do, yes.

Q. Can they rent apartments from you? A. Yes.

Q. Can Negroes rent apartments from you? A. Yes.

Q. All right, can they rent from you at 78 Manhattan Avenue?

The People's Attorney: Objection.

The Court: Sustained. We're not trying that case, Counsellor. Let's not go into anything tenuous here.

Defendants' Attorney: That is the gist of the matter, your Honor.

Mr. Justice O'Brien: It isn't the gist of the matter. The gist of the matter is unlawful intrusion on real estate.

Q. Sir, did Mr. Clarke seek to rent that apartment? A. The day before.

The People's Attorney: Objection.

Mr. Justice O'Brien: Overruled.

Mr. Justice Gassman: You spoke to him the day before, was that in connection with that apartment?

The Witness: Yes.

Q. What is the address of that apartment? A. 78 Manhattan Avenue.

Q. 78 Manhattan Avenue? A. Apartment 1B.

Q. Did he ask to rent from you that apartment? A. He did.

Q. And was that apartment available on that date, February 13th? A. I would say I might have rented it.

Q. You say you might have; under what circumstances would you have rented it?

The People's Attorney: Objection.

The Court: Overruled.

Q. Was it vacant? A. Yes, it was vacant, for two and a half months.

Q. Was it ready for occupancy? A. It was ready for anybody to move in.

Q. Anyone that you approved? A. Anyone I approved.

Q. Did Mr. Clarke make an application for that apartment? A. He did.

Q. On the 13th of February? A. That is correct.

Q. What did you say to him? A. You want me to start from the very beginning?

Mr. Justice Gassman: When the man came to you.

Q. Did he come to you on this date, the 13th? A. The man came on the 13th and said to me, "Mr. Nieman, I hear you have an apartment at 78 Manhattan Avenue and I was there and I looked at the apartment and I would like to rent it." I said to him, "Well, the apartment is really not for rent, it is already for two and a half months vacant and I will wait until I can put it in the newspaper for an advertisement, and see if I get a tenant.

Q. You told him that? A. I told him that. Then he told me that he lived on 92nd Street, it was a slum district of the city and it was not safe to live there, and he was very anxious to have the apartment.

Q. What else did he say, sir? A. After some more talk, I handed him an application and I said fill out the application, and he filled out the application and brought it back to me and then he said, "well, what now?" I said, "put up your money, you have to give a deposit before I investigate." He said, "I only have $5." I said, "$5, that is no offer to bother."

Mr. Justice O'Brien: What did you say?

The Witness: I said, "$5. is not worth to bother with it. It is no value." He said, "Well, I have money in the bank and I would have to go to the bank and get the money." I said, "Well, you'll have to go get the money then, the deposit, before I investigate." I said, "Do you have money, do you have enough in the bank so you can pay about $175. that is one month's rent and one month's security?" and he said, "yes, I do have enough money in the bank." I said, "then, of course, well, I'll see you tomorrow." He said, "Okay."

Q. Did he come back?

Mr. Justice O'Brien: What is that man's name?
The Witness: Clarke.

A. The next time I saw him he was standing in the door frame. He said, "is that apartment still vacant?" and I said, "Yes." And he came over and said, "Can I see one of the leases the tenants have to sign—" I said, "sure," I reached over and got a lease from some of the other tenants and handed it to Mr. Clarke. Mr. Clarke sat down on the chair and started reading it, and in about four or five minutes, the other people came in and Mr. Clarke said, "Mr. Nieman, I've decided not to rent the apartment and I want to transfer my rights of the apartment to Mr. Lawson, and I want you to give the apartment to Mr. Lawson and sign the lease with him." And I said to him, "You have no rights to anything. You cannot transfer anything that you do not have."

Q. May I ask you at this time was the person Clarke a white person? A. Yes he was.

Q. Was the person Lawson a Negro? A. Yes.

Q. The same person that is sitting here—

Mr. Justice Gassman: Before we go too far afield, I think that we ought not to get into the question on any discrimination. There is one simple issue in this case and that is, did the defendants violate Section 2036 on the 14th day of February. Whether or not this complainant as the managing agent of his wife's property or anybody else's property refuse to rent an apartment to a man because he is colored well then, that is something this Court is not going to decide. I don't think we're concerned.

Defendants' Attorney: I'm well aware of the fact that this Court cannot decide issues of discrimination in 2036, but I—

Mr. Justice Phipps: When you bring in this issue, you automatically have a tendency to make it a part of the case. That is why I concur with Justice Gassman that we should leave out those elements.

Defendants' Attorney: I respectfully say that certainly one of the issues is criminal intention and I certainly believe that in defending a matter such as this, intent ought to be shown on the part of the defense, and for that purpose I'm requesting—

Mr. Justice O'Brien: The intent of these people will be spelled out one way or another by what they did on the 14th and not by any transactions or negotiations this witness has with any one of the defendants the day before.

Defendants' Attorney: I don't want to go too far into those issues, but I don't want to get away from the issues involved which was with a view that was directly in the question and the instance was one of the manners which may be based by the people on the question of the purpose of their being there in protest against what was discrimination and it will show the intent of the intrusion. I will withdraw the questioning in that vein.

The People's Attorney: May I state, your Honors, as to the motives involved, all we have to prove is criminal intent, not whether there are motives on the law or the scale—

Defendants' Attorney: May I ask why was it decided the District Attorney offer in evidence a document having to do with organizations from whence they came.

Mr. Justice O'Brien: That was offered and received in evidence as part of what happened on February 14th. Let us assume for the sake of argument,

and I am not passing judgment. Now for the sake of argument that this complainant refused to rent an apartment to one of the defendants because he is colored, then well let's assume for the sake of argument—now the next question is, did this justify the defendant's taking a position in his office and remaining there contrary to his wishes.

Defendants' Attorney: We don't have such evidence that they took possession of his premises against his wishes at the moment.

Mr. Justice Gassman: Six people walked in. I'm reciting factual statements, part of the testimony. Six people go into the office which is approximately 15 x 20—18 by 20 and remain there for about an hour and a half, or an hour and three quarters.

Defendants' Attorney: I withdraw that. I withdraw from the question. I see that it is improper and I strongly protest it but I abide by the rulings of the Court.

Q. Now, this office which you maintain is in the basement of what address is it? A. 50 West 96th Street.

Q. Is that a real estate broker's office? A. No.

Q. It is not? A. No.

Q. Is the office maintained for the purpose of renting apartments which you or your superior have available, is that correct sir? A. It is, yes; that can be said, yes.

Q. Now with regard to the building itself, what size building is it? A. It is 100 x—15 story house.

Q. Did any other defendants come in and do any sort of structure on that building or on that land?

Mr. Justice Gassman: Do any structure?

Q. Did they build a structure on that land?

The People's Attorney: Objection.

Mr. Justice O'Brien: I assume the Court will take it for granted they didn't do any construction work of any kind in there.

Q. Did they erect any monuments or anything of that nature?

The People's Attorney: Objection. Your Honor, there is no such testimony.

Mr. Justice O'Brien: Sustained.

Mr. Justice Gassman: I presume the application was found on Section 2036 which reads, "a person who intrudes on a lot or piece of land within the bounds of the city or village without authority from the owner thereof."

The People's Attorney: That is the Section of 2030.

Defendants' Attorney: I'm not going to debate the issues but I'm sure that your Honors will find that we produce proof we will go into the legislative intent as we have done, and will produce it for the Court, you will find what the intent was meant to imply and not to intrusion.

Mr. Justice Gassman: If anyone can read the legislative intent, you are better than I can on that.

Defendants' Attorney: May I object—I was not aware of that, but I want for the record if I may—

Mr. Justice Gassman: Well, I'm helping to make a record.

Defendants' Attorney: Thank you very much, Judge Gassman.

Q. Did at any time any of these defendants claim that they had a lease upon the premises? A. No.

Q. Did you own the premises? A. Which one, on Manhattan Avenue?

Q. The building? A. On West 96th Street?

Q. Yes? A. On West 96th Street is owned by my wife.

Q. Did you own it? A. My wife owned it.

Q. Is it owned by a corporation? A. No.

Q. Owned by your wife? A. Yes, I transferred it to her name from my own name.

Q. When? A. Five or six years ago.

Q. So that at the time that the defendants were in your place, that real estate office, your wife was the owner, is that right? A. My wife was the owner.

Q. Do you have a deed with you? A. I did not have it, the deed with me.

Q. Showing ownership? A. No.

Mr. Justice Gassman: Who managed that property?

The Witness: I. I manage the property.

Mr. Justice Gassman: 50 West 96th Street?

The Witness: I do.

Q. Actually, sir, you have regular office hours in that office? A. No.

Q. You do not have any office hours? A. No.

Q. What time does the office normally open? A. Whenever I feel like going there and being there.

Q. And are there signs posted so people will know when you will feel like being there? A. No.

Q. Now, sir, you say you had a conversation with one of the officers and you told the officer you closed at five? A. Yes.

Q. And yet you do not have any regular office hours? A set time when your office closed? A. That is right but when I want to go home, I go home at five o'clock because at six I have dinner. If I'm there I leave at five.

Q. And if you want to go home at nine o'clock, you close at nine, is that right? A. If I want to go home at nine at night I would close at nine o'clock at night.

Q. Then on the night that you the defendants were there you wanted to go home at five, is that the reason the office closed at five that day? A. That is generally the time if I'm there.

Q. What did you do with the pamphlets that you say were handed to you by Clarke? A. I have 50.

Mr. Justice Gassman: That is different pamphlets handed by the members. He didn't understand your question, I don't think.

Q. I asked what did he do with the pamphlets that were handed to him by Mr. Clarke?

Mr. Justice O'Brien: The one that is in evidence.

A. I had a lot of them.

Mr. Justice O'Brien: Just a moment. On direct examination, under direct testimony you said that you were handed more than one pamphlet?

The Witness: Yes.

Q. Some were left with you? A. One I kept myself.

Mr. Justice O'Brien: Is that the one that was offered in evidence?

The Witness: That's right.

Q. Now, you say that Clarke and who else came in with the police officer?

The People's Attorney: Objection, that is not the testimony.

The Court: Sustained.

Q. Who came in with the police officer? A. Them two fellows there, the last one and the third last one.

Mr. Justice Gassman: He said that Sutton and Flasher, Wesley Sutton.

The People's Attorney: Indicating Flasher and Wesley Sutton, the third from the last.

Q. Referring to Rabbi Flasher, did you talk with him at all? A. Rabbi Flasher, do you mean the last one; that's news to me.

Q. The last one. A. I didn't know he was a Rabbi at all.

Q. Did you talk with tim? A. Not once, I didn't talk with any of them.

Q. Did you talk with some of them? A. Not a word.

Defendants' Attorney: I have nothing further of this witness.

Redirect examination by Mr. Lehner:

Q. Are any of these defendants tenants of 50 West 96th Street? A. No.

Q. Any of these tenants of 78 Manhattan Avenue? A. No.

Q. Are any of these tenants of any building that you maintain? A. No.

The People's Attorney: No further questions.

The People call Mrs. Catherine Nieman.

CATHERINE NIEMAN, residing at 61-31 Street Fairlane, New Jersey, first having been duly sworn, testified as follows:

Direct examination by Mr. Lehner:

The Court Officer: What is your occupation?
The Witness: Housewife.
Mr. Justice Gassman: I didn't get your name.
The Witness: Katie Nieman.

Q. Now do you know who the owner of 50 West 96th Street, in the County of New York is? You presently own that building? A. Yes sir.

Q. Now I ask you to look at the six defendants seated to the right of Counsel, can you see them? A. Yes.

Q. Did you give any of these six people permission to enter the premises, 50 West 96th Street in the County of New York on February 14, 1963? A. No.

Q. Did you give any of them permission to remain in the premises on that day? A. No.

Cross-examination by Mr. Sutton:

Q. Were you the owner of that building on February 14, 1963? A. Yes.

Q. Did you on that day ask any of them to leave? A. I wasn't there, sir.

Q. Again I ask you the question, did you on February 14, 1963 ask any of these six defendants to leave those premises?

Mr. Justice Gassman: Mr. Sutton, she stated she wasn't there and I assume the logic is that she had nothing to do with it.

Defendants' Attorney: I could get a direct answer on the question.

Mr. Justice O'Brien: You're asking a question after she said she wasn't there. You know she didn't speak to them if she wasn't there; she couldn't have spoken to them.

Defendants' Attorney: Am I entitled to an answer to the question?

Mr. Justice Gassman: Go ahead, I don't want to interrupt, Mrs. Neiman, did you on that day, as owner of the premises, ask any of these defendants to leave?

The Witness: No.

Defendants' Attorney: No further questions.

Mr. Justice Gassman: You weren't there were you?

The Witness: That's right, your Honor.

Examination by Mr. Lehner:

Q. Did you give any of these six defendants permission to enter the renting office of the building—in the basement of that building? A. No, sir.

The People's Attorney: No further questions.

Examination by Mr. Sutton:

Q. Does every person who enters the premises' renting office have your permission, or is that office available for all persons to come and rent?

The People's Attorney: Objection.

The Court: Sustained.

Defendants' Attorney: Sir, am I to understand the form of the question was sustained?

Mr. Justice O'Brien: Yes.

Q. Do you maintain a renting office for the renting of apartments to people in the basement; do you maintain an

office in the basement of 50 West 96th Street? A. I don't, my husband does.

Q. And are you the person to whom one goes to get permission to go there to rent an apartment?

The People's Attorney: Objection.

Mr. Justice O'Brien: Objection overruled.

Q. Was your husband the agent of the house?

The Witness: Yes, sir.

Mr. Justice O'Brien: Do you actually engage in the renting of apartments?

The Witness: Once in a while.

Q. When was the last time you gave anyone permission to enter the apartment?

The People's Attorney: Objection.

Mr. Justice O'Brien: Sustained.

Q. Have you ever given any person permission to enter the apartment of the renting office there?

The People's Attorney: Objection.

Mr. Justice O'Brien: Sustained.

Q. Now you own the building 50 West 96th Street; one desiring to rent an apartment in that building or any other building under your supervision, to what office does that person go?

Mr. Justice O'Brien: Would you repeat the question.

Q. One desiring to rent an apartment in the basement of 50 West 96th Street or any other building under your ownership or control to whom does that person go?

The People's Attorney: Objection.

Mr. Justice O'Brien: Do you understand the question?

The Witness: Yes.

Mr. Justice O'Brien: Where do they go to rent an apartment?

The Witness: In 150?

Mr. Justice O'Brien: Yes, in 150.

Mr. Justice Gassman: 150 or 50?

The Witness: 50, I'm sorry.

Q. In any event, to rent an apartment—by the way, do you own 78 West Manhattan Avenue? A. No, sir.

Q. Is that a rental office in the basement of 50 West 96th Street? A. In 50 West 96th Street is my husband's office.

Q. Does he maintain that office for the purpose of renting apartments?

The People's Attorney: Objection.

The Court: Overruled.

A. It is the renting office for that building.

Defendants' Attorney: No further questions.

The People's Attorney: Next witness.

PATROLMAN McINERNEY, Shield No. 1340, assigned to the 24th Precinct, New York City Police Department, first having been duly sworn, testified as follows:

Direct examination by Mr. Lehner:

Q. On the late afternoon of February 14, 1963 do you recall responding to a communication and going to 50 West 96th Street, County of New York? A. I do.

Q. And when you arrived there, what did you see; approximately what time did you arrive there? A. Four forty.

Mr. Justice Gassman: When?
The Witness: Four forty.

Q. What did you see when you arrived there? A. I proceeded to the basement and I found the complainant and the defendants in the office.

Q. And did you have a conversation with the complainant? A. Yes, I did.

Q. That was Mr. Neiman, is that right? A. Correct.

Q. And after having a conversation with Mr. Neiman, what happened next? A. Well I had found out that the complainant—I asked the defendants the reason they were there.

Q. The defendants were there at the time? A. They were.

Mr. Justice O'Brien: What are their names? How many were there?
The Witness: Seven.

Q. Seven, and Mr. Quinnones would be one of those people? A. Yes.

Q. When you arrived there, who was the first person you saw when you arrived there at the premises, before going into the basement. A. There was Mr. Quinnones in the lobby.

Q. Was he there with anyone else? A. Yes, with another gentleman, I couldn't say who it was.

Mr. Gassman: When you went down to the renting office, who did you go there with?
The Witness: Mr. Quinnones and the other gentleman.

Q. And where is the renting office? A. It is in the basement of 50 West 96th Street.

Q. Now when you arrived there, who was at the office? A. It was the complainant and two males and two females I couldn't—Mr. Lawson was one, I couldn't possibly pick out the other ones—

Q. Two females? A. That's correct.

Mr. Justice Gassman: Who else, one other male?

The Witness: Yes.

Q. And did there come a time when the other male came down there? A. They proceeded in the elevator with me.

Q. Will you answer yes. A. Yes.

Q. And when you were in the office, all six of them were there, is that correct? A. That is right.

Q. Indicating the six defendants in the Court? A. Yes.

Q. Now you had a conversation with the complainant? A. Yes, then I asked them what the reason was for being there for and they said they wanted an apartment rented to one of the defendants.

Q. Then what happened. A. The complainant had shown me a subpoena for him to appear on a later date.

Defendants' Attorney: I object, your Honor.

The People's Attorney: I think that testimony was already in the record.

Mr. Justice O'Brien: Objection overruled.

Defendants' Attorney: May I ask where this conversation was?

Mr. Justice O'Brien: In the renting office, that is what he said.

Q. That conversation was in the renting office? A. That is right.

Defendants' Attorney: May I ask whether it was in the presence of the defendants, if you don't mind, your Honor?

Mr. Justice O'Brien: What do you mean?

Defendants' Attorney: If the conversation was in the presence of the defendants.

Mr. Justice O'Brien: Were the defendants there when the complainant showed you that subpoena?

The Witness: Yes, sir.

Q. After you saw the defendants, what next did you do, what did you say? A. I said to the defendants that since the case was going to be involved in Court, they had no reason to be there since Mr. Neiman didn't want them in his office.

Q. What did Mr. Neiman tell you sir, the complainant? A. That it was to rent an apartment to one of the defendants.

Q. When you first came in there, what did he tell you? A. That they refused to leave his office.

Q. What happened next after you saw the subpoena? A. Then I said, I asked them to leave.

Q. Who did you ask to leave? A. The defendants, the defendants.

Q. Then what happened next? A. Then they just sat there two females were sitting down, and the males were standing. They didn't answer.

Q. What happened next? A. I asked Mr. Neiman to ask them to leave individually.

Q. What did he do? A. Went over, placed his hand on each one and asked them to leave and then they didn't say anything.

Mr. Justice Gassman: Did they leave?

The Witness: No, sir.

Q. And did there come a time when you called back to your precinct? A. Yes.

Q. How long in all did you stay there? A. Forty-five minutes.

Q. And did there come a time you placed the defendants under arrest? A. Yes.

Q. At the time you placed them under arrest, were they still in the premises? A. Yes, sir.

Q. Could you describe these premises in the renting office? A. What, I think he stated 20 by 20, the office has a desk, one chair, odd chairs and a private office, I imagine.

Q. About how many times did you ask the defendants to leave, or how many times were they asked in total, between you and Mr. Neiman before you placed them under arrest? A. In my presence four times, I believe.

Q. Did the defendants say anything else to you? The reason they were there or anything? A. No.

Q. Did they say anything? A. Not that I recall.

The People's Attorney: You may inquire.

Cross-examination by Mr. Sutton:

Q. Did you ever see Mr. Neiman, the owner of this building ask the defendants to leave? A. No.

Q. You arrested the defendants—are you the officer who arrested the defendants, all six of the defendants? A. As assigned officer, yes.

Q. You were the officer? A. Yes.

Q. Now did you assist Mr. Neiman in making a citizen arrest or did you make the arrest? A. I made the arrest on the complaint of Mr. Neiman.

Q. Now when was that, was it after you communicated again with the police precinct from which you came or was that it before you communicated with them? A. Well, I had made a call to the precinct before deciding.

Q. Excuse me? A. I had made a call—

Q. After a conversation with the precinct you then placed them under arrest, is that right? A. We had asked them to leave.

Q. I asked you when you placed them under arrest, do you want to tell me about your asking them to leave again? Did you want to tell me some more about that?

Mr. Justice O'Brien: Just one moment. What did the defendants tell you when you asked them why they were there?

The Witness: It was over renting an apartment.

Q. Is that what they said, it was over renting an apartment, is that all they said to you? A. That is all I recall.

Q. And how long were you in there, sir? A. Forty-five minutes.

Q. Forty-five minutes, and that is the only thing the defendants said to you is the renting of the apartment, is that correct? A. Yes, sir.

Q. And who else was there for that forty-five minutes? A. My partner.

Q. Your partner? A. Yes.

Q. Did you see your partner in any conversation with any one of the defendants? A. Not that I know of.

Q. What did you do for 45 minutes? A. I made a phone call to the precinct.

Q. How long did that take? A. A few minutes.

Q. How long? A. Well, how long does a phone call take?

Q. You tell me how long it took? A. About two or three minutes.

Q. So the rest of the time you were standing there doing nothing? A. After I made the phone call to the precinct, I waited for the Sergeant to come.

Q. Did you have a conversation with them during this time? A. Conversation with who?

Q. Conversation with the defendants. A. No.

Q. Did you have a conversation with Mr. Nieman? A. I don't think so.

Q. When did the Sergeant come in time, in relation to when you got there? A. Fifteen minutes.

Q. Did the Sergeant have a conversation with the defendants? A. Yes, I believe so.

Q. All right, did you recall any conversation that he had? A. No, other than the fact that he asked them why they were there and they explained.

Q. They explained what? A. The fact that they had wanted an apartment.

Q. Rented to who? A. To Mr. Lawson?

Q. Who said that? A. I couldn't recall who said it.

Q. And did any other conversation take place? A. No.

Defendants' Attorney: No further questions of this witness.

The People's Attorney: That is the People's case.

Defendants' Attorney: At the end of the People's case, the defendants move to dismiss on the grounds that the People has not made out a prima facie case under Section 2036 of the Penal Law. We would like argument, your Honor, on a number of issues here involved, besides the question of the right of protest which we wish to raise here and that is the question of 2036.

Mr. Justice O'Brien: Do you want time to submit a memorandum?

Defendants' Attorney: Yes.

Mr. Justice O'Brien: Why didn't you say so.

Decision is reserved. What date are you going to have them here?

The People's Attorney: I ask whether or not the defendant is resting its case?

Mr. Justice O'Brien: Do both sides rest?

Defendants' Attorney: Right, sir.

The People's Attorney: Yes.

Mr. Justice Gassman: May I suggest that you get your briefs in and give the District Attorney two days notice and let him have them by Wednesday.

Mr. Justice O'Brien: We'll adjourn the case until Friday for decision.

Defendants' Attorney: May I do this. At the end of the entire case, Defendants move to dismiss on the ground that the people have not proved the guilt of the defendants beyond a reasonable doubt.

Mr. Justice O'Brien: Decision reserved.

Defendants' Attorney: All right, your Honor, Friday.

(WHEREUPON the within matter was adjourned until Friday.)

The above is certified to be a true and correct transcript of proceedings entitled above.

S/ John S. Green
Official Court Reporter

Minutes of Sentence

CRIMINAL COURT OF THE CITY OF NEW YORK

PART 2B NEW YORK COUNTY

Docket No. B1412, B1413, B1414, B1415,
B1416, B1516

Charge: 2036 of P. L.

THE PEOPLE OF THE STATE OF NEW YORK
on the complaint of

ROBERT NIEMAN

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVENS CLARK, KURT FLASHER,

Defendants.

---

100 Centre Street
New York, N. Y.
April 30, 1963

Before:

Honorable T. VINCENT QUINN
Presiding Judge, Criminal Court
City of New York

Honorable WALTER J. BAYER
Judge, Criminal Court
City of New York

Honorable BENJAMIN GASSMAN
Judge, Criminal Court
City of New York

Minutes of Sentence

Appearances:

Frank Connelly, Esq., Assistant District Attorney
For the People

Percy E. Sutton, Esq., 135 West 125 St. NYC
For the Defendants

David K. Shappiro, Esq., 11 E. 44 St. NYC
For the Complainant

Sal Bonfiglio
Court Officer

Peter J. Galati
Official Court Reporter, CSR

Court Officer: Calendar nine, docket B1412, Joseph Lawson; B1413, Velma Hill; B1414, Vicki Morris; B1415, Wesley Sutton; B1416, Steven Clarke; 1516, Kurt Flashner. Defendants represented by Mr. Percy Sutton.

* * *

Judge Quinn: Now, it is the sentence of the Court in this case that each of the defendants be committed to New York City Penitentiary under Article 7 of the Correction Law, there to be dealt with according to law. Execution of judgment is suspended in each case and each defendant is placed on probation. Now, I want to call your attention that each one of you is now put on notice that a repetition of the offense of which you now stand convicted is going to result in the lifting of the suspension of the sentence and will result in your incarceration. Carry on your fight, but not in disregard of the rights of other people.

The above is certified to be a true and correct transcript of the sentence.

Peter J. Galati
Official Court Reporter

Clerk's Return on Appeal

APPELLATE TERM—SUPREME COURT

First Department

PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVEN CLARK and KURT FLEISHER,

Defendants-Appellants.

I, the undersigned, Clerk of the above-named Court, respectfully make return to the Appellate Term of the Supreme Court for the First Judicial Department and certify upon the affidavit of the appellant's attorney that there are hereto attached correct copies of the Notice of Appeal and of all papers required to be returned pursuant to the Code of Criminal Procedure and the Rules and Regulations of the Appellate Term of the Supreme Court for the First Judicial Department.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the above named Court this 27th day of December, 1963.

/s/ Antonio Godino
Clerk

Order Settling Case

APPELLATE TERM—SUPREME COURT

First Department

PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVEN CLARK and KURT FLEISHER,

Defendants-Appellants.

The foregoing case on appeal, containing all the evidence is hereby settled and ordered on file.

Dated: New York, New York, December 27th, 1963.

/s/ B. GASSMAN
Judge, Criminal Court of
the City of New York

Certification by Attorney

Pursuant to Section 458 of the Code of Criminal Procedure and Section 2105 of the Civil Practice Law and Rules, the undersigned attorney for the defendant hereby certifies that the foregoing record on appeal contains a copy of the Notice of Appeal, the Information, the Minutes of Trial, and the Minutes of the Judgment roll, and that said record has been compared by me with the originals and it is a true and correct copy of the transcript of the whole of such originals.

Dated: New York, New York
December 26, 1963.

Percy Sutton
Attorney for Defendants

ADDITIONAL PAPERS ON APPEAL TO THE COURT OF APPEALS

Certificate Granting Leave

STATE OF NEW YORK

COURT OF APPEALS

Before:

Hon. STANLEY H. FULD, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVEN CLARKE and KURT FLEISHER, (FLASHER),
Defendants-Respondents.

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §520 of the Code of Criminal Procedure permission is hereby granted to the above named appellants to appeal to the Court of Appeals.

Dated at New York, New York, November 13, 1964.

/s/ STANLEY H. FULD
Associate Judge

Certificate Granting Leave

Notice: ***Within 15 days*** from the date hereon an appeal must be taken and this certificate must be filed with the notice of appeal. An appeal is taken by filing in the clerk's office having the judgment roll (trial court) a written notice in duplicate that appellant appeals to the Court of Appeals (§522, Code Crim. Pro.) together with proof that another copy of the notice of appeal has been served upon opposing counsel (§521, Code Crim. Pro.). The appeal must be argued within *90 days* from the date of the notice of appeal (§536, Code Crim. Pro.)

Notice of Appeal to the Court of Appeals

NEW YORK CITY CRIMINAL COURT

NEW YORK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

JOSEPH LAWSON, VELMA HILL, VICKI MORRIS, WESLEY SUTTON, STEVEN CLARKE and KURT FLEISHER, (FLASHER),

Defendants-Respondents.

SIR:

PLEASE TAKE NOTICE that, pursuant to a certificate granting leave to appeal to the New York Court of Appeals issued by Hon. Stanley H. Fuld, Associate Judge of the New York Court of Appeals, on November 13, 1964, The People of the State of New York hereby appeal to the New York Court of Appeals from every part of an order of the Appellate Term of the Supreme Court of New York, First Department, entered October 22, 1964, which order 1) reversed a judgment of this Court rendered May 3, 1963

convicting the defendants of violating Section 2036 of the Penal Law and 2) dismissed the information.

Dated: New York, N. Y., November 23, 1964.

Yours, etc.,

FRANK S. HOGAN
District Attorney
New York County
Attorney for Appellant

Copy to:

CLERK, NEW YORK CITY CRIMINAL COURT
New York County
100 Centre Street
New York, N. Y. 10013

SUTTON & SUTTON, Esqs.
135 West 125th Street
New York, N. Y.
Attorneys for Defendants-Respondents

Order Appealed From

At an Appellate Term of the Supreme Court, First Department, held at the County Court House, Borough of Manhattan, City of New York, on the 22nd day of October 1964

Present:—

Hon. Samuel M. Gold
" George Tilzer
" Samuel H. Hofstadter

April No. 1

The People of the State of New York,
Respondent,

against

Joseph Lawson, Velma Hill, Vicki Morris, Wesley Sutton, Steven Clarke and Kurt Fleisher, (Flasher),
Defendants-Appellants.

An appeal having been taken to this Court by Joseph Lawson, Velma Hill, Vicki Morris, Wesley Sutton, Steven Clarke and Kurt Fleisher (Flasher) the defendants-appellants, from a judgment of conviction by Hon. O'Brien & Gassman (Phipps J., Dissent) Judges of the New York City Criminal Court, upon the charge of violation of Penal Law section 2036, entered on the 20th day of March, 1963, and said defendant-appellant having been sentenced by

Order Appealed From

Hon. Quinn, Gassman and Bayer, Judges of said Court on the 30th day of April, 1963, as follows:

One year in penitentiary; execution of sentence suspended; and probation

and the said appeal having been heard and due deliberation having been had thereon,

It is Ordered and Adjudged that the said judgment so appealed from be and the same is hereby reversed on the law and the facts and information dismissed.

Enter

S M G
Justice Appellate Term
Supreme Court, First Department

Memorandum Decision of the Appellate Term

(N. Y. L. Journal, November 13, 1964, page 1, cols. 1 & 2)

GOLD, J.

This is an appeal by six defendants from a judgment of the Criminal Court, convicting them of violating section 2036 of the Penal Law.

Section 2036 (supra) provides that "a person who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof, * * * is guilty of a misdemeanor."

The information merely charged that the defendants on February 14, 1963, "unlawfully did intrude upon a certain lot and piece of land, and a building thereat, without authority from the owner."

The site of the alleged intrusion was a real estate management office maintained by complainant, Robert Nieman, in an apartment building owned by his wife. On February 13, 1963, defendant Clarke had come to the office and discussed with Nieman the possibility of Clarke's renting a vacant apartment in another building managed by Nieman. The next day Clarke came in, accompanied by defendants Lawson, Hill and Morris. He told Nieman that he had decided to transfer his rights to Lawson and wished Nieman to sign a lease with Lawson. Nieman refused. Hill handed Nieman several leaflets, one of which, entitled "Case Rules for Action," is in evidence as a exhibit. (It is to be noted that Clarke is white and Lawson colored.) Nieman asked the defendants to leave, but they refused and he called the police. When the police arrived, defendants Sutton and Fleisher joined the others and exchanged greetings with them. When the defendants refused police requests to leave, they were arrested.

The word "intrude" is defined in Funk & Wagnall's Standard Dictionary (1941 ed.) to mean "to thrust or force

in without warrant or invitation; * * * to invade." In order to be guilty of a violation of section 2036 (supra) the entry or intrusion must be accompanied by a criminal intent (People v. Stevens, 109 N. Y. 159). The evidence adduced by the prosecution failed to establish that the visit of defendants to the real estate office was originally made with criminal intent. Nieman admitted that "anybody can come in" to his office. There was clearly an implied invitation to Clarke and Lawson to enter Nieman's office in connection with the possible renting of the vacant apartment to Lawson. The implied invitation is broad enough to extend to those who accompanied Clarke and Lawson and those who joined them somewhat later.

It is clear from the majority opinion of the court below that there would have been no conviction had defendants complied with the requests to leave made of them. That opinion states that defendants' "remaining in that office thereafter and their refusal to leave the office when requested to do so by complainant and by the police officer, constituted an unlawful intrusion." The district attorney's brief in this court is also largely predicated upon the refusal of defendants to leave the premises upon request.

In this court's opinion, section 2036 (supra) in clear and unambiguous language, makes criminal only an unauthorized entry upon real property. It does not purport to make criminal a refusal to leave property which had been lawfully entered. No case has been called to the court's attention, or discovered by independent research, which actually holds that the section covers such a situation. The "Proposed New York Penal Law," drafted and recommended by the temporary state commission on revision of the Penal Law and Criminal Code, contains a section (145.10) which makes one a criminal trespasser who "knowingly enters *or remains unlawfully* in a building or upon real property"

(emphasis supplied). The commission's notes state that "in cases where it is not provable that an intruder entered with the requisite criminal intent, appropriate criminal sanctions should be available." The note adds: "The trespass provisions in the existing Penal Law (secs. 1425[a]; 2036), however, are at best ill-defined and narrow in scope (People v. Stevens, 109 N. Y. 159). The proposed Penal Law corrects these deficiencies." It thus seems clear that the commission recognized that section 2036 does not presently make criminal the refusal to leave real property which had been entered lawfully.

A very recent case decided by the United States Supreme Court (Bouie v. City of Columbia, decided June 22, 1964) involved the legality, under a criminal trespass statute of South Carolina, of a refusal to leave a restaurant. The Supreme Court, in reversing convictions by the South Carolina courts, emphasized the basic principle that a criminal statute must give fair warning of the conduct that it makes a crime, quoting from United States v. Harris (347 U. S. 612, 617) as follows: "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

Defendants in the instant case were not fairly apprised by the provisions of section 2036 (supra) that their refusal to leave Nieman's office was a violation of that section. Indeed, the section as written is wholly inapplicable to their refusal to leave. Since defendants have been convicted on the basis of conduct not proscribed by section 2036 (supra) the judgment of conviction is reversed on the law and the facts and the information dismissed.

All concur.

Affidavit of No Other Opinion

State of New York,
County of New York, } ss.:

JOSEPH A. PHILLIPS, being duly sworn, deposes and says: I am an Assistant District Attorney in the office of the District Attorney of the County of New York, and am familiar with all the proceedings had herein.

No opinion has been rendered by the court in making the order appealed from in this case, except as appears in its Memorandum-Decision (N. Y. L. Journal, November 13, 1964, p. 1, cols. 1 and 2).

JOSEPH A. PHILLIPS

Sworn to before me this
28 day of January, 1965

JONAS E. LAMPACH
Notary Public, State of New York
No. 03-2240625
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1965

Certification by Attorney

Pursuant to Section 458 of the Code of Criminal Procedure and Section 2105 of the Civil Practice Law and Rules, the undersigned, Assistant District Attorney in the office of the District Attorney of New York County, certifies that the foregoing record on appeal contains copies of the notices of appeal, complaint, minutes of the trial, minutes of sentence and the order and memorandum decisions appealed from, and that the same is a true and exact copy and transcript of the whole of such originals.

Dated: New York, N. Y., January 28, 1965.

JOSEPH A. PHILLIPS

file Lawson ?

Rather different from Lawson!

Caveat appellant!

94

ANTI-TRESPASS

ATLANTA (AP)-THE GEORGIA SUPREME COURT UPHELD TODAY AN 18-MONTH SENTENCE AND A HEAVY FINE LEVIED AGAINST A WHITE COLLEGE GIRL ARRESTED SEVERAL MONTHS AGO IN A DESEGREGATION SIT-IN IN AN ATLANTA RESTAURANT.

THE UNANIMOUS OPINION RULED THAT MISS MARDON R. WALKER OF EAST GREENWICH, R.I., MUST SERVE THE SENTENCE AND PAY THE $1,000 FINE FOR VIOLATING THE STATE'S 1961 ANTI-PRESPASS LAW. THIS MAKES IT A MISDEMEANOR FOR ANY PERSON TO REFUSE TO LEAVE THE PREMISES OF A BUSINESS UPON REQUEST BY THE OWNER OR MANAGER.

THE COURT REJECTED A CONTENTION OF MISS WALKER'S ATTORNEYS THAT THE APPEAL SHOULD BE DISMISSED BECAUSE OF PASSAGE SINCE HER ARREST OF THE CIVIL RIGHTS LAW.

THE OPINION SAID THAT THE GEORGIA COURT COULD ONLY CONSIDER LEGAL QUESTIONS RAISED AT THE TRIAL OF CASES IN THE LOWER COURTS.

ATTORNEYS FOR THE CONNECTICUT COLLEGE COED ARE EXPECTED TO APPEAL THE DECISION TO THE U.S. SUPREME COURT.

THE GEORGIA JUSTICES UPHELD THE VALIDITY OF THE ANTI-TRESPASS LAW FOR THE THIRD TIME.

KB101PES 11/5

November 18, 1964

Percy E. Sutton, Esq.
135 West 125th Street
New York, N.Y.

Dear Percy:

Re: People v. Lawson, et al.

Obviously, we are pleased to help you on this appeal to the Court of Appeals and naturally we will undertake to do the brief.

We assume and hope that you want to continue your association with the case and we would like your permission to put your name on the brief along with those who work on the brief.

I appeared before Judge Fuld when the certificate was granted. I think he intends to have the clerk set the Collins case and the Lawson case for argument on the same day, and possibly even the Penn case as well.

Kindest regards,

CR

Carl Rachlin
General Counsel

CR:hdl

Law Offices

SQUADRON, ALTER & WEINRIB

STEPHEN WEINRIB
DAVID ALTER
HOWARD M. SQUADRON

LAWRENCE H. ROGOVIN
DIRK S. GOULD

EDWARD C. WEINRIB
COUNSEL

32 East 57th Street, New York 10022

PLAZA 2-6550

November 27, 1964

Carl Rachlin, Esq.
165 West 46th Street
New York, New York

Re: People v. Penn
People v. Lawson
People v. Collins

Dear Carl:

With regard to your letter of November 24th please note that Judge Fuld requested the Clerk of the Court of Appeals to set Lawson and Collins down for argument the same day, not Penn and Collins. In my opinion, it would be appropriate for you to submit a brief amicus in any or all of the cases.

We are putting together the record of the Penn case and will be in touch with you soon so that you can arrange for printing.

Sincerely,

Howard

Howard M. Squadron

HMS:kr

cc: Marvin Karpatkin
George Schiffer

our files as these should be merged as 1 - a

DEC 2 1964

KARPATKIN, OHRENSTEIN & KARPATKIN
COUNSELORS AT LAW

MARVIN MOSES KARPATKIN
MANFRED OHRENSTEIN
RHODA HENDRICK KARPATKIN

660 MADISON AVENUE
NEW YORK 21, N.Y.
TEMPLETON 2-9600
CABLE "KARPOLAW NEWYORK"

December 1, 1964

Carl Rachlin, Esq.
Congress of Racial Equality
38 Park Row
New York, New York

Re: People v. Penn
People v. Lawson
People v. Collins

Dear Carl:

I think that a brief amicus submitted in behalf of CORE would be good policy and wise tactics.

I would further suggest that you make application for leave to present oral argument. While the Court of Appeals is generally disinclined towards allowing oral argument to amici, I do not think it is inflexible, and it would certainly be worth the effort.

Regards,

Marvin M. Karpatkin

MMK:abm

cc: George Schiffer, Esq.
Howard Squadron, Esq.

People v. Lawson

LAW OFFICES

SCHIFFER & COHEN

BARRY LEE COHEN
GEORGE SCHIFFER

40 EAST 49TH STREET
NEW YORK 17, N.Y.
PLAZA 2-8060

January 13, 1965

Percy Sutton, Esq.,
Sutton & Sutton,
135 W., 125 Street,
New York, N.Y.

COPY

Dear Percy:

We want the Lawson transcript and file so that we can proceed with the appeal.

With best wishes,

Sincerely,

George Schiffer

cc: Carl Rachlin, Esq.

FRANK S. HOGAN
DISTRICT ATTORNEY

DISTRICT ATTORNEY
OF THE
COUNTY OF NEW YORK
155 LEONARD STREET
NEW YORK 13, N. Y.
RECTOR 2-7300

MAR 23 RECD

ADDRESS ANSWER TO THE DISTRICT ATTORNEY,
ATTENTION OF THE SIGNER OF THIS LETTER AND
REFER TO NUMBER _____

March 22, 1965

Carl Rachlin, Esq.
165 West 46th Street
New York, N. Y.

Dear Carl:

I received a letter from George Schiffer, dated March 17th, informing me that he would be out of the country between March 14 and the middle of April. He requested that Lawson and any other matters we have "in common" be held "in abeyance" until his return. He also suggested that I communicate with you in his stead in the meanwhile.

I must therefore inform you that as to Lawson at least, we have been notified by the Court of Appeals that the case has been set down for argument on April 12th. The Court specifically stated that the date could not be changed for any reason. I therefore trust that George Schiffer will return in time to handle the matter or that you will arrange to procure a substitute for him. You will have our brief approximately two weeks before the date of argument, as is customary.

As to Sarah Penn, et al., the Court of Appeals granted an enlargement to the week of April 12th and presumably will set the case down for a day certain during that week. Moreover, it would seem logical to put the case on for the same day as Lawson.

Sincerely,

H. RICHARD UVILLER
Assistant District Attorney
In Charge of Appeals Bureau

HRU:fw

April 13, 1965

Stephen Nagler, Esq.
Schiffer & Cohen
40 East 49th Street
New York 17, N.Y.

Re: Lawson

Dear Steve:

The argument went pretty much as expected with Judges Van Voorhees and Fuld understanding the issues. As for the others, quien sabe? Scileppi seemed very disturbed when I said there was no trespass statute in New York State and his comment was, "Do you mean to say I can't put you out of my house or office even though I let you in by consent?"

I made a distinction between house and office but as Karpatkin said, he doubts that the judge was convinced.

I did as I said I would and jumped over Hogan, Gassman and O'Brien, indicating that the reason that the sit-in continued was because these three people had no sensitivity to the existing problem.

I enclose an outline which I prepared for the argument and which you might want to use as the basis for the brief. I am not inclined to think a long brief is useful. The main emphasis on the so-called "trespass" point should be that the Legislature a hundred years ago removed Point 2 of the old statute, which might have covered this point.

I also enclose the following: (1) my notes, which have (a) Frankfurter's quotation from Garner and (b) Harlan's quotation about free speech; (2) miscellaneous sheets with quotations from Gassman and dictionary definitions of "intrude" and the statutory interpretation of ordinary words; (3) pertinent parts of the statutes in Bouie and Lombard and (4) Section 2 of Chapter 397 of the Laws of 1857.

I also enclose, which I trust you will return, the summaries of the cases cited by the District Attorney, as well as an analysis of Bouie.

Please keep in close touch. Remember, the brief is due April 21st.

Sincerely,

Carl Rachlin
General Counsel

Enclosures/
CR:hdl

APR 16 RECD

FRANK D. O'CONNOR
DISTRICT ATTORNEY

Office of the
District Attorney
of Queens County
QUEENS CRIMINAL COURT BUILDING
126-05 HOOVER AVENUE
KEW GARDENS (JAMAICA 15), N. Y.

ADDRESS YOUR REPLY TO THE
DISTRICT ATTORNEY, ATTENTION
OF MR. Ehrlich

April 14, 1965

Hon. Charles S. Desmond,
Chief Judge
Court of Appeals
Albany 7, New York

Re: People v. Lawson
People v. Collins

Dear Judge:

During the course of argument the court inquired with respect to the case law on the interpretation of the word "intrusion" in Section 2036 of the Penal Law. I directed the court's attention to the case of Hewitt v. Newburger 141 N.Y. 538.

May I respectfully bring to the court's attention an excerpt from the opinion in Kilroy et al v. News Syndicate Company, unofficially reported in 32 N.Y.S. 2d 210. In this Kings County, Supreme Court, Special Term case the court stated:

> "Plaintiffs continued occupancy of the house after the receipt of that notice, these defenses, charge, was a trespass and violation of the Penal Law, section 2036. Intrusion on the lands of another is defined as a trespass but because of the nature of the offense, to protect the innocent who could inadvertently violate the letter of that inhibition, it has been held that a successful prosecution for trespass must establish that the accused had an unlawful and criminal intent when transgressing." (underlining mine)

Yours respectfully,

FRANK D. O'CONNOR
District Attorney
Queens County

HARVEY B. EHRLICH
Assistant District Attorney

cc: Marvin Karpatkin, Esq.
Carl Rachlin, Esq.
Joseph Phillips, Esq.

From the desk of

MARVIN KARPATKIN

File Lawson

JUL 8 1965

July 7, 1965

Dear Hank:

For your records, the decision of the Court of Appeals in People v. Collins, affirming the Appellate Term 5-2, Judges Van Voorhis and Scileppi dissenting, has been reported at 16 N.Y.2d 554.

People v. Lawson is reported at 16 N.Y.2d 552.

Regards,

MMK

P.S. Can we get costs? This might be a good question to be researched by whichever one of you has a law student available.

MMK

cc: Melvin L. Wulf, Esq.
Carl Rachlin, Esq.
George Schiffer, Esq.

From the desk of

MARVIN KARPATKIN

I think your peroration was very effective. (But you didn't convince Scileppi)

POINT 1. ; SINCE THIS IS NOT A GENERAL TRESPASS STATUTE

[INSERT B] Appellant cites for its argument in favor of reversing the Appellate Term OF ON DEFINITIONS OF CIVIL TRESPASS

N.Y.C. ADMINISTRATIVE CODE,
CHAPTER 1 TITLE: D1 ; ~~DISCRIMINATION~~
~~TITLE~~ § 1-0 - D-1 - 4.0.
[TITLE] DISCRIMINATION AND SEGREGATION
~~OF~~ IN PRIVATE DWELLINGS.
" § D-1 - 4.0 - Procedure.
~~A PROCEDURE~~
~~TITLE X 41-1.0..~~
D1 - 1.0 — D.1 - 4.0
1.0. LEGISLATIVE DECLARATION
"IN THE CITY OF NEW YORK . . . IN ORDER TO
~~GUARD A~~ " . . . IT IS HEREBY DECLARED ~~TO~~ BE
THE POLICY OF THE CITY TO ASSURE EQUAL
OPPORTUNITY TO ALL RESIDENTS, TO LIVE IN
DECENT, SANITARY, AND HEALTHFUL LIVING
QUARTERS, REGARDLESS OF RACE, COLOR, RELIGION,
NATIONAL ORIGIN OR ANCESTRY,

(A) THE STAT FROM WHICH §2036 WAS ORIGINALLY DERIVED WAS DIVIDED INTO SECTIONS MAKING UNLAWFUL ENTRIES, AND ~~WRONGFULLY~~ REMAINING ON PROPERTY SEPARATE CRIMES. ONLY THE FORMER WAS CARRIED THROUGH IN THE PRESENT CRIMINAL STATUTE

POINT I: §2036 OF THE PENAL LAW APPLYING TO UNLAWFUL INTRUSION DOES NOT APPLY TO THE ACTS OF RESPONDENTS WHO ENTERED THE PREMISES HEREIN LEGALLY.

(A) THE ~~REPEAL~~ ~~TRANSFERENCE~~ DELETION BY THE LEGISLATURE OF §2 OF CHAPTER 326, LAWS OF 1857, TO ~~THE~~ FROM THE PENAL LAW PROVE THAT THE ACTS OF RESPONDENTS IN REMAINING ON THE PREMISES HEREIN COULD NOT BE A CRIME UNDER §2036.

(B) UNDER THE ORDINARY DEFINITION, TO "INTRUDE" ONE MUST WRONGFULLY ~~IS WRONGFULLY~~ ENTER, WHICH IS NOT THE CASE HERE.

(C) A "TAKING OF POSSESSION" IS A NECESSARY ELEMENT UNDER §2036. ~~KEELER V. STEVENS, 58 N.Y. 174 (1888)~~

III HAVING ENTERED THE PREMISES OF THE COMPLAINANT LAWFULLY, ~~DEFENDANT'S~~ RESPONDENT'S PEACEFUL CONDUCT THEREIN WAS "PROTECTED SPEECH."

NEW YORK
Amsterdam News
W. 61,795

NOV 14 1964

Court Favors Sit-Ins

As many as 2,000 persons arrested in New York civil rights demonstrations over the past two years, could be cleared as a result of a decision handed down late last month by the Appellate Division of the Supreme Court.

Unanimously reversing six "sit-in" convictions of CORE members who staged a sit-in in an upper Manhattan real estate office, the Appellate Division ruled that the trespass statute under which they were convicted applies only to unlawful entries on property, not to the refusal to leave.

Harlem Assemblyman - Elect Percy E. Sutton, who with his brother, Oliver, Sutton, of 135 W. 135th St. successfully appealed the 2-1 trespass convictions handed down by a three - man bench on March 20, 1963, hailed the decision as a landmark in civil rights cases in the state.

The six CORE members, Joseph Lawson, Rabbi Kurt Flasher, Mrs. Velma Hill, Vicki Morris, Wesley Sutton and Stevens Clarke, had staged a two-hour sit - in in the offices of Robert Neiman, 50 W. 96th St., on Feb. 1963, when Neiman allegedly refused to rent an apartment to Lawson.

Percy Sutton said that the conviction and dismissal of the charges marks the first New York State appeals court ruling on the legality of the sit - in as an instrument of protesting Northern - style racial bias.

In ther trial, the six were convicted by a three - judge panel, with Judges Benjamn Gassman and Patrick O'Brien voting conviction, while Judge Kenneth N. Phipps vigorously dissented that the statute applied only to squatters on rural property.

Sutton said he would move in other sit-in cases soon for blanket dismassals based on the Appellate Division's ruling. Assisting the Sutton brothers in the case were Attorneys O. T. Wells, William C. Chance, and G. Donald Covington.

PITTSBURGH, PA.
NEW YORK COURIER (N)
W. - CIRC. N.AVAIL

NOV 21 1964

N.Y. Supreme Court Reverses Six Housing Sit-in Convictions

Hundreds of New York civil rights demonstrators may be cleared by a recent decision handed down by a New York State Appellate Court. In terse language the decision read:

"The New York State Supreme court appellate term first department has reversed the spring 1963 sit-in convictions of six New York CORE defendants."

Marvin Rich, CORE community relations director is reported to have said that the decision would effect many of the more than 1,500 persons arrested in civil rights demonstrations in New York over the past two years.

Assemblyman-elect Percy E. Sutton and his brother, Oliver C. Sutton, both veteran civil rights attorneys with offices in Harlem, successfully appealed the trespass conviction. Atty. William C. Chance and O. T. Wells had assisted Percy Sutton at the trial of the matters and Atty. G. Donald Covington had assisted on the appeal and dismissal of the charges. This marks the first New York State Appeals Court ruling on the legality of the sit-in as an instrument for protesting Northern style racial discrimination.

The successful sit-in defendants had been convicted on March 20, 1963, for an alleged violation of New York State's archaic "unlawful intrusion law" (Section 2036 of the Panel Law).

The defendants were originally tried before a New York City Criminal Court composed of three criminal court judges sitting as a jury panel.

Judge Kenneth Phipps, a Negro, dissented from the majority and voted to free the defendants who had been arrested as they staged a sit-in at an East Side Manhattan real estate management office.

The interracial team of housing testers had discovered apparent racial discrimination in the rental of apartments by that office.

Among those freed as a result of the New York Supreme Court ruling was Joseph Lawson who had sought to rent an apartment in the complaints building.

Also freed were Velma Hill, an employe of the National Office of CORE, Vicki Morris Wesley, Sutton Steven Clarke and Rabbi Kurt Fleisher.

MSS SEDFRE

STATE OF NEW YORK V. OLDER - CASE, CORRESPONDENCE, 1965

State Historical Society of Wisconsin

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Box 40
Folder 25

NEW YORK SUPREME COURT
APPELLATE TERM — FIRST DEPARTMENT

- -x

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

:

JULES OLDER, :

Defendant—Appellant. :

- x

Sir:

PLEASE TAKE NOTICE that on the annexed affidavit of BRIS A. SKIV7, Assistant District Attorney, verified the 6TH day of OCTOBER, 19[illegible], and on all the papers and proceedings herein, the undersigned will move this Court, to be held at the County Court House, 60 Centre Street (Room 401), in the Borough of Manhattan, in the City of New York, on the 18TH day of OCTOBER, 19[illegible], at 10 o'clock a.m., or as soon thereafter as counsel can be heard, for an order dismissing the above-entitled appeal on the ground that the appellant has failed to prosecute the said appeal.

Dated: New York, New York, October 4, 19[illegible].

Yours, etc.,

FRANK S. HOGAN
District Attorney
New York County

To: BURIS A. OHLD, ESQ.
[illegible] BROADWAY
NEW YORK, NEW YORK 10013
Attorney for the Appellant.

JULES OLDER
[illegible] MULBERRY ST.
NEW YORK, N.Y.
Defendant-Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

JULES OLDER, :

Defendant-Appellant. :

- x

STATE AND COUNTY OF NEW YORK, ss.:

ERIC A. SELIT, being duly sworn, says:

I. That he is connected with the Office of the District Attorney of the County of New York, and is familiar with all the papers and proceedings had in the above-entitled appeal.

II. That the above-named appellant was convicted of the crime of VIOLATION OF SECTION 792 SUBDIVISION 2 OF THE PENAL LAW in the Criminal Court of the City of New York, County of New York, and judgment of conviction rendered against him on the 9TH day of AUGUST 19 63, from which judgment he appealed to this Court. That the notice of appeal was served herein on the 13TH day of AUGUST 19 63.

III. That the appellant has failed to serve the record on appeal and appellant's points.

IV. That the appellant was issued a Certificate of Reasonable Doubt on August 12, 1963, and no enlargements of time have been granted.

WHEREFORE, deponent asks that an order be made and entered in this Court dismissing the appeal herein, for all of which no previous application has been made.

Eric A. Selit
Assistant District Attorney

JEAN F. MURRAY, Notary Public
State of New York No. 03-2832950
Qualified in [illegible] County
Cert. filed in New York County
Term Expires March [illegible]

Sworn to before me this day of , 19 .

STATE AND COUNTY OF NEW YORK, ss.:

EDWARD A. PHILLIPS being duly sworn, deposes and says, that on the 4th day of OCTOBER, 1948, he served the within Affidavit and Notice of Motion on JULES OLDER, Appellant, and MEEKS & GOLD, ESQS., Attorneys for Appellant, by enclosing a true copy thereof in a securely sealed postpaid wrapper and depositing the same in a Post-Office box regularly maintained by the United States Government at No. 100 Centre Street, in the Borough of Manhattan, City of New York, directed to said Attorneys at MEEKS, etal (Attys) 277 BROADWAY NEW YORK, N.Y. and J. OLDER (Appels) 310 MULBERRY ST. NEW YORK, N.Y., that being the address within the State designated by them for that purpose on the preceding papers in this action.

Edward A. Phillips

Sworn to before me, this

4th day of OCTOBER, 1948.

JAY F. MURRAY, Notary Public
State of New York No. 03-23-2350
Qualified in Bronx County
Cert. Filed in [illegible] County
Commission Expires [illegible]

NEW YORK SUPREME COURT
APPELLATE TERM : FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

Jules Older,

Defendant-Appellant.

AFFIDAVIT and NOTICE OF MOTION
TO DISMISS APPEAL

FRANK S. HOGAN

District Attorney

155 Leonard Street
Borough of Manhattan
New York City

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : FIRST DEPARTMENT

- x

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

JULES OLDER, :

Defendant-Appellant. :

- x

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto, that the motion to dismiss the above entitled appeal, filed in this Court on the 4th day of October, 1965, be and the same is hereby withdrawn.

Dated: New York, New York, October 14, 1965

Frank S. Hogan by Eric A. Seiff
Attorney for Respondent

Stephen M. Nagler
Attorney for Appellant

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM :FIRST DEPARTMENT

- x

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

JULES OLDER, :

Defendant-Appellant. :

- x

STATE AND COUNTY OF NEW YORK, ss.:

ERIC A. SEIFF, being duly sworn, says:

That he is an Assistant District Attorney in the Office of the District Attorney of the County of New York, and is familiar with all the papers and proceedings had in the above-entitled appeal.

That a motion to dismiss the above named appeal was filed in this Court on the 4th day of October, 1965.

That shortly thereafter, we were informed by the appellant that this appeal stems from a Civil Rights action.

That a check of our records revealed this to be the case and further, that an aggreement had been made wherein this case, among others, was to be held in abeyance pending a final determination of the case of Peo. v. Sara E. Penn et al, which case - recently affirmed by the Court of Appeals [16 NY 2d 581] - has, or will shortly have pending a Petition for a writ of certiorari in the U. S. Supreme Court.

WHEREFORE, it is respectfully requested that the motion to dismiss be withdrawn.

Sworn to before me this 14th
day of October, 1965

JAY F. MURRAY, Notary Public
State of New York, No. 03-2832950
Qualified in Bronx County
Cert. Filed in New York County
Commission Expires March 30, 1967

CR.5-8811
226 East Third Street
New York, New York 1009
October 9, 1965

Mr. Eric A. Seiff
Assistant District Attorney
New York County, New York

Dear Mr. Seiff,

I was dismayed to receive your affidavit today informing me that my appeal was to be heard next Monday. The case stems from a civil rights action which is more than two years old, and this is the first communication I have had about it since that trial.

In the interval, I have changed lawyers, and, as of two years ago, I was being represented by Mr. Marc Lane rather than by Mr. Leonard Rubin. I am now unable to contact Mr. Lane and have heard that he now lives somewhere in England. The location of the court records (which were in his hands) is similarly unknown to me.

From today's hasty inquiries, it seems that I will have to secure new counsel and will certainly have to search for the documents of defense. If you would be so understanding as to postpone the case for a few months, it would be of great help. With some anxiety, I await hearing from you.

Yours truly,

Jules Older

226 East Third Street
New York City
GR 5-8831
October 12, 1965

Dear Mr. Rachlin,

Thank you for taking an interest in my case. I hope fervently that you can get a postponement until the Supreme Court decision; if you can't, I'm afraid--very much afraid-- that I'm going to be locked up for thirty days in the immediate future. Let me briefly review for you what's gone on so far.

During August of 1963 I was employment chairman of Downtown CORE, and as such I captained the picket line of the Rutgers Housing Project. Mickey Schwerner, Laury Rhodell, and I alternated in this position, and on August 2, 1963 I led a small line, including some unsolicited neighborhood children, until 3 PM, our usual quitting time. We were sending the kids home when Sgt. McClancey arrested me for alledgedly hitting him in the pants leg with my cardboard sign. I did no such thing, and five witnesses were ready to swear to it. I was taken to the station, bailed out by CORE, and by the time I went to the hearing, I found myself further charged with the disorderly conduct of leading children under heavy equipment, i.e. a crane maneuvering a block away from where we weren't picketing or doing anything else but get the kids home.

In court my CORE volunteer lawyer strongly advised me to plead guilty to the discon so that the assault would be dropped. This I foolishly did, and promptly got 30 days in the workhouse. A Certificate of Reasonable Doubt (which I took to be an appeal) was filed. Shortly thereafter I met Marc Lane who told me that the case had been mishandled and that he would handle the appeal. Since then, although I tried repeatedly at the time, I have been unable to contact Mr Lane, and I understand that he is now living in England.

Last Saturday I received tha affadavit of the D.A., and I'm apparently just six days away from jail. Damnit! Not only am I a husband, a graduate student, and a psychotherapist, but I'M innocent to boot.

I'll call you from work later today. Thank you again.

Sincerely,

Jules Older

Jules Older
GR5-8831

MSS SEDFRE
646

State of New York vs Penn, Sara E. Oct. 1963 - Dec. 1966

Box 4/0
Folder 26

...ty of Wisconsin

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NEW YORK SUPREME COURT
APPELLATE TERM: FIRST DEPARTMENT

- x

STATE OF NEW YORK,

Plaintiff-Respondent,

- against -

SARA M. PEEN, HELENA L. IRVINE, DARGARA PLISKOW, EDWARD W. PITT, BENITA T. CANNON, CLAUDIO RAMOS, THOMAS McKENNA, NEIL CRATKIN, ISIDORE T. BLOCH, DAVID RIVERA and SAUL GOTTLIEB,

Defendants-Appellants.

- x

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

Statement

This is an appeal by defendants from disorderly conduct convictions of each of them, after joint trial on separate complaints, by the Criminal Court of the City of New York, County of New York, Samuel J. Ehringer, J., presiding. The decisions were rendered on September 26, 1963, after two days of trial, finding that each defendant had violated both subdivisions 2 and 3 of Section 722 of the Penal Law.

There is no opinion of the Court below.

The Complaints

The complaints in each case allege that on August 1, 1963, at the Rutgers Street City housing project, the defendant placed himself or herself in a sitting position in the roadway, obstructing the free passage of vehicular traffic; used loud and boisterous language, causing a crowd to collect; and refused, after being asked by a police officer, to move out of the roadway.

The Statute

The relevant portions of Section 722 of the Penal Law, upon which the complaints were based, are as follows:

"Disorderly conduct

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

* * *

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others.

"3. Congregates with others on a public street and refuses to move on when ordered by the police;"

The Facts

These prosecutions arose out of "sit-downs" by eleven unrelated individuals who attempted to call to the attention of the police that the building trades unions engaged in construction

of the Rutgers Street City housing project on the lower east side of Manhattan discriminated against Negroes and Puerto Ricans in violation of Sections 41 and 43 of the New York Civil Rights Law and Section 393-8.0 of the New York City Administration Code, and that there was discriminatory hiring at the project in violation of Section 220-e of the Labor Law. (173).*

The "sit-down" occurred on that portion of a private access road running through the middle of the housing project, which leads from Rutgers Street to one of the outer gates to the project (22). There had been daily picketing and demonstrations at the project during the weeks immediately preceding (73). Representatives of the press, radio and television were on hand (64); and picketing was in progress (51).

Forty patrolmen, 4 sergeants, 1 police captain, a deputy inspector and assistant chief inspector from the New York City Police Department were present controlling the pickets (74), and keeping traffic moving on Rutgers Street (57; 69).

The defendants were among the pickets. They include among their number, 3 Ph.D.'s, a Ph.D. candidate, a college instructor, a former college instructor, a writer, a junior high school teacher and 4 social workers with college degrees (172-173; 192-196). At approximately 10 A.M., Salvatore Enna, driving a truck loaded with concrete, approached the closed gate of the housing project (9-10). Defendants Pitt, Penn, Flisher and Levine, without concerted action (10-12; 18-19), each independently sat down in the roadway in front of the entrance

* References are to pages of the trial transcript.

to the project. Kane thereupon stopped his truck. He did not ask the defendants why they were there or what they wanted. He was given no opportunity to do so, since he was immediately told by a ranking police officer to come down from his cab to listen to the comments made by the police to the defendants. (19-20)

First, photographers and newspaper reporters were given an opportunity to interview the defendants and take pictures. Then, Sergeant Thomas Coyne, acting as principal spokesman for the Police Department, (53) requested the defendants to move. Coyne did not ask Pitt, Penn, Pliskow and Levine the purpose for sitting in the roadway.(64) He merely told them that they were blocking the delivery of concrete. (53-58; Q-3) When they did not answer and failed to move they were placed under arrest; and they then promptly walked in a peaceful and orderly manner to the patrol wagon. (55) They used no loud, boisterous language, uttered no profanity, did or said nothing disrespectful, and acted peacefully, without violence, throughout. (65-66)

The delivery of concrete was delayed by 90 minutes, approximately 15 minutes of which was attributable to the fact that the defendants were photographed and interviewed. (55; 33) Photographers who took pictures were standing in the roadway (67); but none of the patrolmen asked photographers, newsmen or television cameramen to get out of the roadway. (66-67) There was another entrance to the project but the police did

not suggest that Kane use it (114). He knew of that entrance, but made no effort to back out and drive around the block to reach it (85). The gate to the project was locked at all times (69).

At approximately 11:15 A.M., the same morning, Paul Orlando, driving a concrete truck, followed by Salvatore Kane, driving a second truck, came down Rutgers Street and turned into the access road towards the gate (15-16; 37-38).

As Orlando approached the gate, Ramos [Orlando identified Rivera (39), but the police testified it was Ramos (88)] sat down in the roadway, and then Cannon sat down in the roadway (38-39). Their acts of sitting down were independent and not done in concert (46). Orlando stopped his truck; but he did not ask the defendants why they were there or what they wanted. Once again the police took charge -- they promptly asked Orlando for his driver's license. (40) Sergeant Harold McAuley told the defendants to move and when they failed to do so they were placed under arrest. (96-97) They were told to walk to the patrol wagon, which they did in a peaceful manner. (97) They did not utter any loud or boisterous language nor use any profanity or become abusive or insulting or act in other than a quiet and peaceful manner (45-46; 123).

At approximately the same time, defendants McKenna, Gottlieb and Rivera, acting independently and not in concert, sat down in front of the closed gate to the housing project.(88) Defendants McKenna, Gottlieb and Rivera were in no way responsible for the truck stopping but they were told by Sergeant

McAuley to move from in front of the gate. When they failed to reply, they were placed under arrest and were told to walk to the patrol wagon, which they did. None of them uttered any loud or boisterous language or used profanity or became abusive or insulting, or acted in other than a quiet and peaceful manner (95-96; 123).

At approximately the same time, defendants Chatkin and Bloom sat down underneath the back wheels of Kane's truck (92-93), which had already stopped because Orlando's truck was blocking the path. (92) Kane did not speak to any of the defendants; he did not ask them to move nor did he ask them why they were sitting where they were. Sergeant McAuley once again took charge, asked the defendants to move, and when they failed to respond, placed them under arrest. (97-98) At his request they got up and walked peacefully to the patrol wagon without uttering any loud or boisterous language or any profanity, and without becoming abusive or acting in other than a quiet and peaceful manner.

Throughout this entire period, members of the press were allowed to take pictures of and interview the defendants (33; 125-27); and were permitted to stand in the roadway without hindrance or objection from the police (126).

Although there were police barricades and police holding back the pickets, none of the defendants pushed past a policeman, knocked over a barricade, or was restrained by a policeman from walking into the roadway (65-66; 112; 123).

Earlier the same morning, at the other gate to the project, coming into the other end of the same private road from Pike Street, there had been "sit-downs" and concrete trucks had stopped, and the police had re-routed the trucks to the Rutgers Street gate without arresting any "sit-downs" (81-82; 188-189).

Defendants established through the testimony of Harold Klorfine, Secretary to the New York City Housing Authority, that on August 1, 1963 there were various building trades unions engaged in work at the Rutgers Street housing project (160-163). Defendants then offered the testimony of Professor Donald Shaughnessy of Columbia University, who had conducted an 8 month investigation for the New York State Advisory Committee to the U.S. Commission on Civil Rights (165) concerning the unlawful discrimination practiced by such trade unions. Defendants also offered testimony to the same effect of Mr. Madison Jones, Executive Director of the City Commission on Human Rights (146; 147-9); and of Mrs. Shirley Siegel, Assistant Attorney General in charge of the Civil Rights Bureau of the New York State Attorney General's office (170-171). The court granted the motion of the District Attorney to strike the testimony of these witnesses (209).

The trial court also refused to admit evidence concerning the knowledge of the trunk drivers of the existence of unlawful discrimination at the Rutgers Street housing project on August 1, 1963 (23-5; 48-50), or of the knowledge of the police concerning such unlawful discrimination (78). The police were not

permitted to testify as to whether they investigated unlawful discrimination within the housing project or assured any of the defendants that such a possibility would be looked into. (76-9, 128-30).

SUMMARY OF ARGUMENT

1) The eleven complaints allege without exception that the defendants used loud and boisterous language, causing a crowd to collect. In fact, no such language was used; in fact, defendants did nothing of an unpeaceful or boisterous nature. All of the prosecution witnesses were positive on this point (truck driver Kane at p.23; truck drive Orlando at pp.54; Sergeant Coyne at pp.56; Sergeant McAuley at p.[illegible]). Moreover, there was only speculation that defendants might have caused an increase in a crowd already collected (70-73).

Section 722, by its plain terms, requires proof that a defendant intends to breach the peace, or commits acts whereby a breach of the peace may be occasioned. To sustain a criminal conviction, such proof must be beyond a reasonable doubt. It is respectfully submitted that the District Attorney failed to prove beyond a reasonable doubt either the allegations of the complaint or the elements of the crime of disorderly conduct set forth in Section 722.

To the contrary, the proof demonstrates that to dramatize a protest a peaceful ritual exercise was performed, in which the police participated willingly; and that, in fact, there was never the slightest possibility of disorderly conduct

or breach of the peace.

2) The purpose of the protest was to call the attention of the public authorities to the commission of unlawful discrimination. Such a "sit-down" protest is a legitimate exercise of the constitutional rights of free speech and public assembly; and is an appropriate method of requesting redress of grievances by government officials. If it is deemed a violation of local law, then the local law unconstitutionally infringes the rights of the defendants pursuant to the First and Fourteenth amendments to the Constitution. If there was reasonable ground to believe unlawful discrimination existed at the job site and the truck drivers and police knew of such grounds but did nothing about it, the protest was not only appropriate, but necessary. Indeed, the arrest of the defendants may have been "state action" in aid of discrimination. In any event, the trial court was in error in rejecting testimony as to the basis for the charge that discrimination existed, as to the knowledge of the truck drivers and police, and the action of the police to investigate unlawful discrimination at the job site.

3) The Vehicle and Traffic Law forbids obstruction of traffic and requires persons who obstruct traffic to move on when requested to do so by the police. No acts tending to breach of the peace were proved in the case at bar. Either the

disorderly conduct section of the Penal Law was improperly applied, or the Vehicle and Traffic Law has no meaning.

POINT I

THE EVIDENCE IN THE COURT BELOW WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS

In each of the cases at bar, there are three allegations of acts purportedly committed in violation of subdivision 2; obstructing the free passage of vehicular traffic, using loud and boisterous language, and causing a crowd to collect. None of these allegations are supported by the evidence.

With respect to the allegation of using loud and boisterous language, the record is directly to the contrary. Every witness testified that the defendants were not loud or boisterous in any way.

There was no showing that the actions of the defendants caused a crowd to collect. There were many onlookers, pedestrians and members of the press on the site before the incidents occurred. The police had the situation well in hand. There is some testimony that a few more persons may have arrived; but there is no evidence that they were attracted to the scene by defendants' acts, or that they caused any additional police problem. Clearly, the defendants did nothing insofar as onlookers were concerned to create a likelihood of a breach of the peace.

Finally, it is clear that there was no obstruction of vehicular traffic. Traffic on Rutgers Street kept moving freely at all time (57; 69). The record shows nothing more than that Hans and Orlando stopped their trucks for a short time after some of the defendants sat down, and before others did so. There was no testimony that either Hans or Orlando considered themselves "obstructed". Clearly, mere stopping of a truck is not obstruction, without an inquiry by the truck driver, a decision that he wishes to proceed further, and a complaint to the police that he is being obstructed. If mere stopping were obstruction, a person who stopped a truck to warn that a bridge was out would be "obstructing". In the cases at bar, before inquiry, decision or complaint could be made, the police moved in and commenced the ritual leading to arrest. If the defendants could have made their complaint known, the truck drivers may have decided not to proceed; or the defendants may have removed themselves from the roadway.

Moreover, even if mere stopping were "obstruction", a conviction under subdivision 2 of Section 722 requires more. Otherwise, the person seeking to warn that a bridge was out would be guilty of disorderly conduct for stopping the truck. Obviously, as the preamble to Section 722 clearly states, there must also be an intention to breach the peace or circumstances which make a breach of peace likely.

A violation of Section 722 involves motion either (a) "with intent to provoke a breach of the peace", or (b) under circumstances "whereby a breach of the peace may be occasioned".

As stated by this court in People v. Dongan, 19 Misc. 2d 941 (Ap. Sess. App. Part 1st Dept. 1959), at p. 943:

> "To constitute disorderly conduct, there must be proof not only that (1) the defendant committed the acts charged, but also that (2) they were committed with intent to provoke a breach of the peace or under circumstances likely to cause a breach of the peace. Each case must depend upon the time, place and circumstances of the act. (People v. Perry, 265 N.Y. 362, 364). 'The act complained of must at least be one which reasonably does tend to a breach of the peace'. People v. Nixon, 248 N.Y. 182, 186)."

The term "breach of the peace" was defined by the Court of Appeals in People v. Most, 171 N.Y. 423 (1902) as follows:

> "A breach of the peace is an offense well known to the common law. It is a disturbance of the public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community."

These principles were applied most recently by the Court of Appeals in People v. Carroll, 3 N.Y. 2d 327 (1957), a case involving several elements present in the instant cases. Two defendants were convicted of disorderly conduct for walking back and forth in front of the entrance to the United Nations,

the defendant carried a placard and the other approached passersby and handed them or attempted to hand them leaflets. The complaint alleged that their actions interfered with and obstructed the free passage of persons through the entrance. When asked to move by a police officer, the defendants refused to do so. The court separately analyzed subdivisions 2 and 3 of Section 722. It noted that mere inconvenience of pedestrians was insufficient to support a conviction under subdivision 2. It concluded (p.332):

> "There is absolutely no showing here that defendants caused any serious annoyance to pedestrians or that their manner was threatening or abusive. Indeed, the only evidence upon which the conviction might be predicated was the arresting officer's simple statement that the defendants 'were blocking the pedestrians' right of way'. That evidence we hold to be insufficient."

The earlier authorities are completely in accord with the Carnal decision that subdivision 2 of Section 722 is inapplicable, to cases of mere interference, unless, in addition, the conduct tends to a breach of the peace. Thus, in People v. Gould, 73 N.Y.S. 2d 399 (City Ct. Utica 1947), where defendant, a taxicab driver, was charged with disorderly conduct for soliciting passengers in a private railroad station after being told not to do so and there was no showing that he used any loud, offensive or disturbing language or conduct, the court dismissed the case. The same result followed in People v. Mc. Stefanis, 34 N.Y.S. 2d 52 (City Ct, Utica 1942) where the

defendant was guarding his father's tools and refused to leave someone else's property when requested to do so by two police officers. Since there was no showing of loud or angry talk, boisterous or profane language or physical violence or threat of physical violence, the case was dismissed even though the court recognized that the defendant's actions may have been "annoying, disturbing and perhaps offensive". Again in People v. Richett, 153 N.Y.S. 2d 953 (Sp. Sess., App. Part, 1st Dept. 1959) peaceful behavior precluded a conviction under subdivision 2 of Section 722. The court held that sleeping on a subway train was not disorderly conduct since the evidence failed to establish that the defendant committed a breach of the peace or did anything likely to bring about a breach of the peace.

Even repulsive conduct, where there is no breach of the peace or likelihood of a breach of the peace, cannot support a conviction for disorderly conduct under Section 722, subdivision 2. In People v. Malnia, 163 N.Y.S. 2d 744 (Otsego Co. Ct., 1958) the defendants spilled beer and expectorated on a car in a public parking lot. There was no evidence of anyone being present and since there was no likelihood of a breach of the peace, the charge was dismissed.

In the cases at bar, the defendants did nothing but sit peacefully on an access road. Forty-four policemen,

including a chief inspector, were present at all times and in complete control of the situation. There was not even the possibility of a breach of the peace.

> "the presence of the police officers prevented any breach of the peace, because it is to be expected that the officers will not themselves breach the peace.
>
> • • •
>
> "Since there was no actual breach of the peace and since the presence of the police made such a breach of the peace extremely remote if not impossible, an essential element of the charge of disorderly conduct is missing. Feenie V. Re Manitoba, at p.54, supra.

Indeed, in the cases at bar, the unlikelihood of a breach of the peace is emphasized by the actions of the police.

There had been daily picketing and demonstrations at the project during the weeks immediately preceding the incidents. Representatives of the press, radio and television were on hand. Everyone was performing for the press. Some testified that he was delayed 20 minutes and that 15 minutes of the time was attributable to the fact that the defendants were photographed and interviewed. The police allowed the photographers to move freely upon the scene. The police had complete control of the situation at all times. There had been sit-down demonstrations in the roadway at the other entrance to the project; the police saw fit to allow them to continue and merely re-routed the trucks. No breach of the peace was created by the other demonstrations, and it was clear that the peaceful actions of the defendants in the instant case created no breach of the peace. Yet they were arrested as the conclusion to the ritual, without any consideration of whether there was, in fact, a likelihood of breach of the peace.

It is therefore respectfully submitted that the charge in each case under Section 722, subdivision 2, should have been dismissed not merely for lack of proof, but because the proof affirmatively demonstrated the absence of those elements essential to sustain a disorderly conduct conviction.

The complaint in each case also alleged that the defendant refused after being asked by a police officer, to move out of the roadway. This allegation is an apparent attempt to support the charge under subdivision 3 of section 722. However, the complaints completely fail to allege the offense set forth in subdivision 3. There is no allegation in any of the complaints of "congregating with others" as required by subdivision 3. "Congregating" is a crucial element of the offense. In the Carval case, supra, the court noted that "congregating" (p. 333):

"implies and is usually applicable to the coming together of a considerable number of persons (Powell v. State, 62 Ind. 531), or a crowd (Webster's New Collegiate Dictionary; the Oxford Dictionary [1923]) and a crowd has been defined as a throng, multitude or great number of persons (People v. Phillips, 245 N.Y. 401, 402). The term 'congregates with others', as used in the statute, requires at the very least three persons assembling at a given time and place (People v. Le Vecchio, 16 Misc. 197, 201, supra). It would be an unjustifiably liberal interpretation of subdivision 3 and at variance with the strict construction called for in these cases to hold that the defendants here, only two in number and as appears from the record not even standing together, were 'congregating with others'. Investigation of the cases decided under this provision fails to reveal any contrary holding. In the cases upholding convictions there was either a large group (People v. Reid, 256 N.Y. 536); a group of persons (People v. Caldwell, supra); a number of persons (People v. Edwards, supra); or a crowd (People v. Williams, 6 Misc. 2d 977; People v. Hudson, 6 Misc. 2d 956; People v. Berry, 6 Misc. 2d 956).

The defendants have not been able to find a single case in which a conviction was sustained where the record disclosed fewer than 5 people "congregating". In the Sarsel case and in People v. Lo Vecchio, 185 Misc. 197 (City Ct. Utica 1945) the courts held that 2 people could not "congregate" within the meaning of subdivision 3 of section 722.

In the case at bar, a separate complaint was issued for each of the defendants and a joint complaint for the remaining 2 defendants. A joint trial was held for the convenience of the Court, because the arrests were made together, but it was clearly stipulated that each defendant was being charged and tried separately(3-4). None of the complaints suggested that any defendant was "congregating" with any other defendant, nor does the record show any evidence of "congregating".

Four "sit-downs" were testified to by the police, one involving three persons, and two involving two persons. one involving four persons near each other. However, there was no evidence that the defendants were linked together in any way; there was no evidence of a preconceived plan or of concerted action. The testimony was that each defendant individually sat down on his own initiative, independently of every other defendant.

Under any circumstances, when only two persons were near each other, there could be no "congregating" since the Court of Appeals has specifically held, in the Carpel case that "at least three persons" are required. It is submitted that, in the circumstances of the cases at bar, there was no "congregating", even where more than two persons happened to "sit down" near each other. Even if the defendants had been "congregating", there was no offense since the action was not such as to cause a breach of the peace as required by the preamble to section 722.

People v. Galpern, 259 N.Y. 279, suggests that a mere refusal to obey an order of a police officer to move on may be disorderly conduct, unless the defendant can show that the police officer's direction was arbitrary and not calculated to promote the public order. Clearly, the decision must be read in the context of section 722, which requires proof of conduct tending to breach of the peace. Otherwise, the burden of proof would be reversed, and the police would be able to order citizens about whimsically and willy-nilly. In the Galpern case, the likelihood of breach of the peace may well have been inferred from the fact that the action took place at midnight, the defendant was in fact, congregating with

"3 or 6 other persons" and there were other groups standing nearby. However, there was apparently only one policeman at the scene. On these facts, a conviction of disorderly conduct was sustained; in the case at bar, the facts proved by respondent affirmatively demonstrate that no disorderly conduct occurred.

With respect to subdivision 2, there has been a complete failure of proof of obstructing others, loud and boisterous behavior, or causing a crowd to collect. With respect to subdivision 3, there has been no proof of congregating; and with respect to the entire charge, there has been no proof of any action by any defendant thereby intent to breach the peace, or thereby a breach of the peace may have been occasioned. Indeed, all of the evidence indicates that the defendants were at all times peaceful and that the circumstances were such that breach of the peace was virtually impossible.

The elements of a criminal statute must be precisely and strictly defined "Liberal interpretation", of Section 722, in the words of the Court of Appeals in [illegible] would be "at variance with the strict construction called for in these cases". (2 N.Y. 2d at 493) Respondent had the burden of proving

each and every defined element of the crime charged beyond a reasonable doubt; but failed to do so.

POINT II

DEFENDANTS ARE PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The record clearly demonstrates that each defendant acted in the manner he did solely to attract the attention of the law enforcement authorities to illegal discrimination being practiced by the building trades unions at the Rutgers housing site. Defendant Levine testified:

> "A. I intended to bring it to the attention of the authorities there was discrimination being practiced in the building trades unions, which was against the law, in violation of the law.
>
> "Q. Was it your intention to communicate this fact to public authority? A. Yes, it was." (175).

It was stipulated by the People and the remaining defendants that each defendant would give the same testimony concerning his own intent if he took the stand (192).

Thus, it is clear that defendants were engaged in peaceful protest against the comission of illegal discrimination in an effort to have the laws prohibiting discrimination enforced. There is no question that laws do exist in this State and City, prohibiting discrimination

by labor unions on account of race, creed, color or national origin. See, N.Y. Civil Rights Law, §§ 41, 43; N.Y. Labor Law, § 220-e; N.Y.C. Admin. Code, § 343-8.0. The only question is whether acts designed to call the attention of the authorities to non-enforcement of such laws including "sit-ins" and "sit-downs", are protected by the United States Constitution as a proper exercise of free speech, and the proper exercise of the rights of public assembly, and to petition for redress of grievances.

The Supreme Court of the United States has held that peaceful protest against racial discrimination, including "sit-ins", are constitutionally protected. Edwards v. South Carolina, 83 S. Ct. 680 (1963); Shuttlesworth v. Birmingham, 83 S. Ct. 1130 (1963); Peterson v. Greenville, 83 S. Ct. 1119 (1963); Johnson v. Virginia, 83 S. Ct. 1053 (1963).

In Edwards v. South Carolina, supra, the South Carolina courts expressly found that defendants demonstration in protest against racial discrimination had created "an actual interference with traffic and imminently threatened disturbance of the peace of the community" and

'materially impeded' vehicular and pedestrian traffic. Id. at 5. . The majority of the Supreme Court found that traffic had been allowed, rather than impeded (id. at) and held:

> "in arresting, convicting and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances."

In the cases at bar, defendants, at most, caused two trucks to stop temporarily in the course of trying to focus the attention of the public authorities on the commission of a crime. As did South Carolina in Edwards, New York has, by arresting defendants on a charge of disorderly conduct, infringed on defendants' "constitutionally protected rights of free speech, free assembly and freedom to petition for redress of their grievances."

In Lombard v. Louisiana, U.S. (1963), three Negroes and one white person were convicted of trespass, after being refused service in a privately owned restaurant, and refusing to leave the restaurant. The Court reversed the convictions of the "sit-ins" on the ground that officially declared segregation was

unconstitutional and unenforceable by trespass action. However, since a white person, who could have received service without violating city policy was involved, the decision actually upholds the right of "sit-in" protest against racial discrimination by any person.

It must be particularly emphasized that defendants were attempting to "put on the sleeve" of apparently unknowing and unwilling government officials, to draw their attention to the commission of a crime. While the right of free speech is not abolish, it clearly extends to any peaceful communication required to alert public officials to lawbreaking. Obviously, it is in the public interest to encourage such communication.

Of course, any such communication should not itself be violent or carry the threat of violence. That is clearly not a problem in the cases at bar. As the Supreme Court stated in Edwards v. South Carolina, supra, in words that can be applied without change to the cases at bar:

> "There was no violence or threat of violence on their [defendants'] part or on the part of any member of the group seeking them. Nothing they did within the [city] ...

Also, any such communication, whether by speech or verbal act, should have reasonable basis. You may even shout "Fire" in a crowded theatre if there is a fire; or a reasonable basis for belief there is a fire. Certainly, you may, by peaceful verbal act, "tug at the sleeve" of a policeman if there is reasonable basis for belief that a crime is being committed. In the cases at bar, defendants offered to prove the reasonable basis for their belief that illegal discrimination was being practiced by the building trades unions working on that day at the Rutgers housing site. They offered the testimony of Madison Jones, Executive Director, New York City Commission on Human Rights (142); Mrs. Shirley Siegel, Assistant Attorney General in Charge, Civil Rights Bureau of the New York State Department of Law (168); and Professor Donald Shaughnessy, author of the 1963 Report of the New York Advisory Committee to the U.S. Commission on Civil Rights (169) (Defs' Ex. B); and offered as exhibits Professor Shaughnessy's report, as well as the 1960 Report of the New York State Commission against Discrimination (Defs.' Ex. A).

It is respectfully submitted that the trial court, by striking such testimony and refusing to admit such exhibits, committed reversible error.

It should be noted that the police witnesses testified they knew that defendants were attempting to call their attention to the fact that illegal discrimination was being practiced by the building trades unions working at the Rutgers housing site (78-79; 128). The trial court then refused to permit the police to testify whether such charges were ever investigated (79-80; 129-130). It is submitted that such testimony should have been admitted. In the present state of the record; it is unsettled whether the police, by arresting defendants to permit entry into the housing site of the concrete trucks, were knowingly contributing to the continuance of illegal discrimination. If so, the arrests by the police and convictions by the trial court might constitute "state action" in violation of the Fourteenth Amendment to the United States Constitution. Cases cited, supra, page 24; and Delaware v. Brown, Supreme Court of Delaware, November 6, 1963, #64.

In summary, it is respectfully submitted that the arrest and conviction of the defendants violated their rights under the First and Fourteenth Amendments to the United States Constitution; and that any construction of Section 722 of the New York Penal Law upholding such conviction would render such section unconstitutional.

POINT III

SECTION 722 OF THE PENAL LAW HAS NO APPLICATION TO THE CASES AT BAR

It is a traffic infraction for any person to "fail or refuse to comply with any lawful order or direction of any police officer or other person duly empowered to regulate traffic". Vehicle and Traffic Law, Section 1101-1102. It is a traffic infraction for any person to obstruct traffic in the City of New York. Section 63, New York City Traffic Regulations.

We submit that the defendants in the cases at bar were not guilty of any wrongdoing; but if a technical violation of law was committed, it was, at most, a traffic infraction. Otherwise, Section 1102 of the Vehicle and Traffic Law and Section 63 of the New York City Traffic Regulations have absolutely no meaning.

In People ex rel. Kelly v. Gould, 73 N.Y.S. 2d 399 (City Court, Utica, 1947) defendant taxi driver refused to leave a private railroad station when ordered to do so. The Court dismissed the complaint, holding:

> "There is an increasing tendency to employ section 722 whenever it is determined a person should be arrested. This should not be countenanced by the courts. The term 'breach of the peace' was a term well known to the common law. It signified the disturbance of the public peace and tranquillity by any act or conduct inciting to violence to

tending to provoke or incite others to breach the peace. As was stated in People ex rel Conley v. Frank, supra [245 App. Div. 777, 281 N. Y. S. 139], it is a 'disturbance of public order by an act of violence, or by an act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.'"

In People v. Helmis, 183 N.Y.S. 2d 744 (Otsego Co. Ct. 1958), defendants expectorated and spat beer on a car in a public lot. The Court stated that defendants may have been guilty of other crimes, but dismissed the charge of disorderly conduct.

The point made in the Gould and Helmis cases is applicable to the cases at bar. The "increasing tendency to employ Section 722 whenever it is determined a person should be arrested" should be discouraged. The consequences of a conviction for disorderly conduct are likely to be substantially more serious than the consequences of traffic infraction conviction. Defendants should not be subjected to charge of the greater offense where, if any impropriety was committed (which we deny), it was a mere traffic infraction.

CONCLUSION

FOR THE FOREGOING REASONS, THE CONVICTIONS OF ALL ELEVEN DEFENDANTS SHOULD BE REVERSED AND THE COMPLAINTS DISMISSED

Respectfully Submitted,

HOWARD N. SQUADRON
ALAN S. ROSENBERG
Attorneys for Defendants

OF COUNSEL:

LAWRENCE E. ROGOVIN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

STATE OF NEW YORK,

Plaintiff,

- against -

SARA E. PENN, HELENA L. LEVINE, BARBARA PLISKOW, EDWARD W. PITT, BENITA T. CANNON, CLAUDIO RAMOS, THOMAS McKENNA, MERYL CHATKIN, ISIDORE T. BLOOM, DAVID RIVERA and SAUL GOTTLIEB,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

HOWARD M. SQUADRON, being duly sworn, deposes and says:

I am the attorney for each of the above-named defendants; and represented them during the trial herein. I am familiar with all of the proceedings heretofore had herein; and make this affidavit in support of application that a certificate of reasonable doubt issue herein to said defendants pending appeal from judgment of conviction by each of said defendants to the Appellate Term of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

The complaint filed against each of the defendants herein in the Criminal Court of the City of New York, County of New York, on August 1, 1963, accused each defendant of the offense of disorderly conduct in violation of Section

722, sub-divisions 2 and 3 of the Penal Law of the State of New York, in that on the 1st day of August, 1963, in the City of New York, County of New York, each defendant did, with intent to provoke a breach of the peace and under circumstances whereby a breach of the peace might be occasioned, place himself in a sitting position in the roadway of Madison and Rutgers Streets, obstructing the free passage of the vehicular traffic, causing a crowd to collect; and each defendant did refuse to move on when requested to do so by the police. The location at which the alleged offenses occurred is the site of a New York City Housing Authority housing project.

On September 25th and 26th, 1963, defendants were tried in the Criminal Court of the City of New York, County of New York, by the Hon. Samuel J. Ohringer on said charges of disorderly conduct; and found guilty. Each defendant was sentenced on October 2, 1963, by Hon. Samuel J. Ohringer to pay a fine of Twenty Five ($25.00) Dollars or, in default thereof, to be incarcerated for a period of five (5) days in the Workhouse.

The application for certificate of reasonable doubt is based on the following grounds:

1. By the weight of the evidence, the People did not prove beyond a reasonable doubt that any defendant was guilty of disorderly conduct in violation of the aforesaid statute.

2. By the weight of the evidence, the People did not show that the actions of any defendant were committed with intent to provoke a breach of the peace and under circumstances whereby a breach of the peace might be occasioned, as charged in each complaint. The People undertook to

prove both "intent" and "circumstances" (notwithstanding the statute reads in the disjunctive); and utterly failed to prove either. The "circumstances" likely to cause a breach of the peace depend on the actual state of facts in any case. In the instant situation, the People's evidence established that 47 members of the police force were present at the scene of the alleged offense before, during and after the alleged individual sit-downs of the defendants, during all of which time peaceful picketing was going on behind police barricades in protest of unlawful discrimination in the construction industry; that on-lookers who were observing said picketing, and who were present at the time of commission of the alleged offenses, were supervised by the police on hand, and did not in any way become or threaten to become unruly, disruptive or engage in any unwholesome or violent conduct; and that, according to testimony of the police officers, there was no violence or any threat of violence on the part of any defendant at any time. There was never any actual breach of the peace or threatened breach of the peace, or causing of alarm among a substantial segment of the community. Instead, there was a peaceful protest by defendants, in ritual form, in which the police participated by allowing newspaper photographers to photograph and circulate among the defendants for some time before the arrests were made. Furthermore, the police permitted sit-downs at the other entrance to the building project without making other arrests or ordering the persons engaged in those sit-downs to move on. The People failed to introduce any evidence that complaint of obstruction of vehicular traffic had been made.

3. The judgment of conviction of each defendant is unconstitutional and in violation of the First and

Fourteenth Amendments of the Constitution of the United States of America. The acts alleged to constitute the offense occurred in protest against unlawful discrimination in the construction industry. Acts of peaceful protest, including "sit-ins" and "sit-downs", are protected by the Constitution of the United States as in the exercise of free speech, the right of public assembly, the right to petition for redress of grievances, and the right to equal protection of the laws. Edwards v. South Carolina, 83 S. Ct. 680 (1963); Shuttlesworth v. Birmingham, 83 S. Ct. 1130 (1963); Peterson v. Greenville, 83 S. Ct. (1963); Johnson v. Virginia, 83 S. Ct. 1053 (1963).

In all of these cases, the defendants therein did something for the purpose of protesting discrimination. In all of the cases the defendants did more than merely picketing. In all of the cases the defendants used no violence, but refused to remove themselves at police orders. In all of these cases the United States Supreme Court refused to uphold the convictions. It is submitted that in the instant case the State has infringed on the defendants' "constitutionally protected rights of free speech, free assembly and freedom of petition for redress of their grievances" (Edwards v. South Carolina, supra), especially in view of the Court's consideration in Edwards of the fact that "there was no violence or threat of violence on their [defendants'] part or on the part of any member of the crowd watching them. Police protection was ample."

4. By the weight of the evidence, the People do not show that any defendant, in violation of Section 722

sub-division 3 of the Penal Law, congregated "with others on a public street and [refused] to move on when ordered by the police". Aside from defendants LEVINE and PLISKOW, each defendant was charged by separate complaint of the offense of disorderly conduct; and the trials of defendants were consolidated. The proof conclusively established that the act of the sit-down was the spontaneous and individual act of each particular defendant. There was no evidence that any defendant congregated "with others", as defined by the Court of Appeals in People v. Carael, 3 N.Y. 2d 327 (1957), in the course of each defendant's sit-down. The People were required to prove that each defendant congregated "with others" in the commission of the offense charged - and this the People have failed to prove.

5. With respect to defendants PENN, PITT, PLISKOW and LEVINE, the People did not prove they committed the alleged acts, in the words of the Penal Law, "on a public street". The entire record establishes that said four defendants sat down on a private street on private property owned by the New York City Housing Authority, a public corporation. Refusal to leave private property cannot constitute the offense of disorderly conduct. People ex. rel. Terry v. Ewald, 73 N.Y.S. 2d 399 (1947); People ex rel. Planezunas v. Stefanis, 34 N.Y.S. 2d 52 (1942).

The following ruling of the Justice who presided at the trial of the above-named defendants was erroneous:

1. The trial court erred in granting the People's motion to strike the testimony of Madison Jones, Executive Director of the New York City Commission on Human Rights;

Shirley Siegel, Assistant Attorney General of the State of New York, in charge of the Civil Rights Bureau of the New York State Department of Law; and Professor Donald Shaughnessy; and in refusing to admit into evidense Defense Exhibit No. 1 for identification, viz.: 1960 Report of the New York State Commission Against Discrimination, and Defense Exhibit No. 2 for identification, viz.: 1963 Report of the New York Advisory Committee to the U.S. Commission on Civil Rights. As noted previously, the Supreme Court of the United States has held peaceful protests against discrimination are protected by the United States Constitution. In the instant case, the defendants were exercising their constitutional rights in protest of criminal discrimination in the construction industry. The evidence excluded was material relevant and competent; and reversible error was committed by its exclusion. Such evidence established the unionized character of workers at the housing project in question; discrimination in the construction industry and elsewhere in New York; the failure of State and City law enforcement authorities and agencies to enforce the laws against discrimination, viz. New York Civil Rights Law, §§ 41, 43; New York Labor Law, § 220-e; New York City Administrative Code, § 343-8.0; and the awareness on the part of such authorities and agencies with of complaints that discrimination existed in the building trades unions, and that City housing projects were constructed by labor supplied by such unions. It is respectfully submitted that the exclusion of such evidence was prejudicial error; that defendants were acting entirely in the exercise of their constitutional rights; and that defendants' conduct was wholly justified by the long-continued failure of the State and City to enforce the laws against criminal discrimination.

building trades

No previous application has been made for the relief sought herein.

WHEREFORE, your deponent respectfully requests that certificate be granted that in the opinion of this Court there is reasonable doubt whether the judgment of conviction should stand.

Sworn to before me this
3rd day of October, 1963

DIRK S. GOULD
Notary Public, State of New York
No. 41-1521475 Queens County
Term expires March 30, 1965

At a Term of the Supreme Court of the State of New York held in and for the First Judicial District at the Criminal Courthouse in the City of New York in said District on the day of October, 1963.

P R E S E N T :

HON.

J.S.C.

STATE OF NEW YORK,

Plaintiff,

- against -

SARA E. PERRI, HELENA L. LEVINE, BARBARA PLISKOW, EDWARD W. PITT, BENITA T. CANNON, CLAUDIO RAMOS, THOMAS McKENNA, MENDEL CHATKIN, ISIDORE T. BLOOM, DAVID RIVERA and SAUL GOTTLIEB,

Defendants.

An application having been made at the above-mentioned term of this Supreme Court upon the record of the trial had in Criminal Court of the City of New York, County of New York, at which the above-named defendants were convicted of the offense of disorderly conduct in violation of Section 722, sub-divisions 2 and 3 of the Penal Law of the State of New York; and upon the reasons set forth in the accompanying affidavit herein of Howard M. Squadron, Esq., verified the 3rd day of October, 1963 that a certificate of reasonable doubt issue herein to said defendants,

and that the said defendants be admitted to bail pending an appeal from such convictions; and said application having been duly considered upon its merits; and after hearing Howard M. Squadron, Esq., attorney for defendants, in favor of said application; it is hereby

ORDERED that said application be and the same hereby is granted, and that a certificate of reasonable doubt issue in favor of said defendants, and that each of said defendants be admitted to bail in the sum of $50.00, or other sum heretofore set for them pending and during trial.

U. S. C.

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

STATE OF NEW YORK,

Plaintiff,

-against-

SARA E. PENN, HELENA L. LEVINE, BARBARA PLISKOW, EDWARD W. PITT, BENITA T. CANNON, CLAUDIO RAMOS, THOMAS McKENNA, MERYL CHATKIN, TED BLOOM, DAVID RIVERA and SAUL GOTTLIEB,

Defendants.

STATE OF NEW YORK :
SS.:
COUNTY OF NEW YORK :

HOWARD M. SQUADRON, being duly sworn, deposes and says:

I make this affidavit in reply to the affidavit submitted herein by Assistant District Attorney Richard H. Kuh; and in support of defendants' application that a Certificate of Reasonable Doubt issue herein.

I have read the affidavit, submitted herewith, of defendant Edward W. Pitt. I was present with Mr. Pitt at last night's meeting with the other defendants in this case. The reasons ascribed in defendant Pitt's affidavit for his unwillingness to pay the fine imposed are the same as those stated by him at such meeting; and are the same reasons stated by and the bases for the decisions of defendants, Cannon, Levine and Bloom that they too would serve their sentences of incarceration rather than pay their fines.

With regard to defendants Claudio Ramos and David Rivera, I have been informed by them that they are unable to pay the fines imposed because they lack sufficient funds therefor.

Contrary to Mr. Kuh's assertion in paragraph 4 of his opposing affidavit, Section 529 of the Code of Criminal Procedure does not require the "record of the cause" to be submitted with the application for the Certificate of Reasonable Doubt. People v. Trinauer, 77 Misc. 387, 136 N.Y. Supp. 833 (Sup. Ct. 1912). As the Court noted in such case, "The statute does not say that the moving papers must contain the record, but only that they must contain a formal specification of the particular rulings alleged to have been erroneous and of any other grounds upon which the application is based." 77 Misc. at 392. The required "formal specification" has been set forth in my principal affidavit submitted in support of the application. Accordingly, no defect has in fact been waived by the People. In any event, the two-day lapse since sentencing certainly precluded defendants from obtaining, for the purpose of this application, the record of the two-day trial. The objection that two days' notice of motion need be given on this application is equally without merit, as the time requirement of Section 529 of the Code of Criminal Procedure specifically applies only to an appeal from conviction of a felony or misdemeanor - and the defendants herein were convicted of having committed an offense.

Certificates of Reasonable Doubt have recently been granted as a matter of course in all previous Section 722 - Penal Law - Anti-Discrimination-Demonstration cases,

notwithstanding that the District Attorney's Office has opposed every such application on grounds similar to his instant opposition; and notwithstanding that in such cases the facts concerning the alleged acts of those defendants were far worse than the evidence of entirely peaceful protest adduced at the trial herein.

It is not defendants' position, as Mr. Kuh would have the Court believe (Kuh's affidavit, paragraphs 7 and 16), that "noble motivation" excuses everything. Rather, it is defendants' position that there was no intent to breach the peace (as the People have charged) - and, it is submitted, the peaceful and orderly acts of defendants demonstrate this lack of intent - nor was there any proof that a breach of the peace might have been occasioned by defendants' acts. Such are necessary elements of the offense charged, and are mandated by Section 722 of the Penal Code. Significantly, the People have completely ignored the question of breach of the peace. Instead, the State's argument is devoted to the specific elements of Sub-divisions 2 and 3 of Section 722. Not one shred of evidence was presented at the trial herein to show that a single person had complained to the police or anyone else of being "obstructed" by defendants' acts. On the contrary, evidence established, and the photographs handed up during the argument show that the gate across the access road in question was closed prior to and during the sit-downs. The question, therefore, is not one of "noble motivation." The question is whether defendants are guilty of having violated the specific sub-divisions of Section 722 with which they are charged; and, if so, whether their acts were committed with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned.

Mr. Kuh's summarization, again in terms of noble motivation, of the constitutional question presented is itself absurd. Simply stated, the Constitution protects the right of free speech and assembly to petition for redress of grievances; and,it is submitted, defendants were lawfully exercising thoseconstitutional rights. It should be noted that the dissent in Edwards v. South Carolina, 83 S. Ct. 680 (1963) referred to specific testimony in the record which established that the defendants in that case had obstructed and blocked pedestrian and vehicular traffic. As summarized by the dissent: "It was only after the large crowd had gathered . . . and which together with the students had become massed on or around the 'horseshoe' so closely that vehicular and pedestrian traffic was materially impeded, that any action against the petitioners was taken." 31 L.W. 4228 (February 26, 1963).

Mr. Kuh erroneously states in paragraph 11 of his affidavit in opposition that defendants' actions were not spontaneous, but the result of a "pre-conceived plan" to obstruct construction. The facts adduced during the trial herein established that some of these defendants had never met one another and that there had been no prior meeting of the defendants to formulate a preconceived plan. The testimony of defendants was that each had acted individually, on his own, without any prearranged signal and without knowing whether he would be joined by others in acting as he so did.

The reference in paragraph 13 of the opposing affidavit that Sub-division 3 of Section 722 was not at issue in the Carsel case is erroneous. While the defendants

in that case were specifically charged with violation of Sub-division 2 of Section 722, the Court, after having determined that no violation of such sub-division had occurred, considered the question of whether there was in fact a violation of Sub-division 3. The Court of Appeals, after defining the term "congregates with others", and applying its definition to the facts, held that there had been no violation of Sub-division 3. People v. Carcel, 3 N.Y. 2d. 327, 333, 165 N.Y.S. 2d 113, 117 (1957). Even assuming, as Mr. Kuh does (Kuh's affidavit, paragraph 13), without conceding, that the "sit-downs and lay-downs of the defendants were designed to block particular trucks" under the facts of this case the record is clear that the People have failed to prove the necessary element pertaining to breach of the peace.

The evidence which the Court ordered stricken upon motion of the People was not offered to demonstrate the "noble motive" of defendants (Kuh's affidavit, paragraph 16). Its purpose was to show that reasonable grounds, viz.: discrimination in the Building Trades Union, existed for the protest of defendants; and for the exercise of their constitutional rights of free speech and petition for redress of grievances. See Edwards v. South Carolina, 83 S. Ct. 680 (1963); Shuttlesworth v. Birmingham, 83 S. Ct.1130 (1963); Peterson v. Greenville, 83 S. Ct. (1963); Johnson v. Virginia, 83 S. Ct. 1053 (1963). As such, the proffered evidence was relevant to the issue in question; and the exclusion thereof is reversible error.

The affidavit in opposition assumes throughout that defendants had committed a disorderly act; and argues throughout that a disorderly act intentionally committed cannot be made lawful by virtue of the motivations of defendants. Such assumption, however, merely begs the question. Defendants contend that the acts complained of were not disorderly within the confines of the Penal Law. We concur in the District Attorney's quotation of Judge Cardozo's statement that "One of the most fundamental social interests is that law shall be uniform and impartial." There is no basis for treating the instant application different than any other application for Certificate of Reasonable Doubt. There is no basis for making examples of cases similar to the one in question. It is submitted that questions of law and fact have been "raised sufficient for the consideration of the appellate tribunal"; and therefore submit that the instant application should be granted. We content that in application for Certificates of Reasonable Doubt the law makes no distinction between a $25 fine and a ten year jail sentence. If the Court has reasonable doubt as to the correctness of the law laid down by the Trial Court, whether the case be one of sentence or fine, the Certificate must issue. As noted previously, two defendants, viz., Claudio Ramos and David Rivera, are financially unable to pay the fine imposed by the Trial Court.

People v. Trinsuer, supra,

Howard M. Squadron

Sworn to before me this
4th day of October, 1963.

LAWRENCE H. ROGOVIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-3330285 - Queens County
Commission Expires March 30, 1965

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

STATE OF NEW YORK,

Plaintiff,

-against-

SARA E. PENN, HELENA L. LEVINE, BARBARA PLISKOW, EDWARD W. PITT, BENITA T. CANNON, CLAUDIO RAMOS, THOMAS McKENNA, MERYL CHATKIN, TED BLOOM, DAVID RIVERA and SAUL GOTTLIEB,

Defendants.

AFFIDAVIT

STATE OF NEW YORK :
COUNTY OF NEW YORK: ss.:

EDWARD W. PITT, being duly sworn, deposes and says:

I am one of the defendants herein. I reside in the City of New York, and make this affidavit in support of application that a Certificate of Reasonable Doubt issue herein.

I am negro, twenty-four years old, and employed by the Hamilton Madison House, a social settlement house on the lower east side of New York City as a social group worker. I am married and the father of a six-month old boy. I graduated from North Carolina Agricultural and Technical College, Greensboro, North Carolina in June, 1960; and have completed one year of graduate study as a candidate for a masters degree in social work at Adelphi College, Garden City, New York.

I have been active in the negro civil rights movement since 1958; and during that period have participated in sit-in protests in the south. When I first became active in

such movement, I decided that at all times I would act in a non-violent manner; and not create any disorder by my own actions. I also decided at that time that if I was jailed for any such non-violent protest I was prepared to accept the punishment, but I would not cooperate in any punishment to the extent of paying any fine imposed against me for such protest.

In the instant case, I was careful to insure that my protest against discrimination in the building trades unions would be peaceable, that I would not resist arrest or resist any police officer. My actions in this case have been consonant with my initial decision to protest discrimination in a non-violent manner; and in accordance with my convictions I am prepared, if necessary, to serve the jail sentence imposed.

Last night, October 3, 1963, I attended a meeting with the other defendants in this case. At such meeting, defendants Benita Cannon, Helena L. Levine and Ted Bloom stated that they, too, were prepared to serve the sentence of incarceration imposed by the Court, rather than pay the fine imposed.

I have been advised by my attorney that there are substantial questions of law and fact which must be determined by an appellate court on the appeal of this action. Notwithstanding that my conviction may be reversed and set aside by the appellate court, I am prepared, nevertheless, to be confined pursuant to sentence of the court in accordance with the dictates of my principles in this matter.

EDWARD W. PITT

Sworn to before me this
4th day of October, 1963.

LAWRENCE H. ROGOVIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-3330285 - Queens County
Commission Expires March 30, 1965

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

- -X

STATE OF NEW YORK,

Plaintiff,

-against-

SARA E. FEHN, HELENA L. LEVINE, BARBARA PLEIKON, EDWARD W. PITT, HERMINA T. CAMINOS, CLAUDIO RAMOS, THOMAS McKENNA, MERYL CHATKIN, ISIDORE T. BLOOM, DAVID RIVERA and SAUL GOTTLIEB,

Defendants.

NOTICE OF APPEAL

- -X

SIRS:

PLEASE TAKE NOTICE that the above-named defendants hereby appeal to the Appellate Term of the Supreme Court, First Department, from a judgment of conviction of the Criminal Court of the City of New York, County of New York, rendered on October 2nd, 1963 convicting the defendants of a violation of § 722, sub-divisions 2 and 3, of the New York Penal Law, and imposing upon each defendant a fineof $ 25. or, in default thereof, five (5) days in the Workhouse, and from each and every part thereof.

Dated: October 4, 1963

Yours, etc.

HOWARD M. SQUADRON
Attorney for Defendants
Office & P. O. Address
32 East 57th Street
New York 22, New York

TO:

DISTRICT ATTORNEY
County of New York

Clerk of the Criminal Court of the
City of New York, County of New York

THE FOLLOWING PAGE(S) ARE THE BEST COPY AVAILABLE.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- - - -

affidavit, it is the position of the People that not even a colorable basis is alleged for entertaining any reasonable doubt as to the correctness of those defendants' convictions for disorderly conduct. Section 527 of the Code of Criminal Procedure specifically provides that a certificate shall only issue if "in the opinion of [the] court there is reasonable doubt whether the judgment should stand, and not otherwise." (emphasis supplied). This Court has noted that "there is a definite presumption that a conviction and sentence are legal and proper." See Pugsley v. Sloan, 181 Misc. 827; 823 (Sup. Ct. 1943).

DEFENDANTS' FIRST ALLEGED BASIS -- THAT THE PEOPLE HAVE NOT PROVED GUILT BEYOND A REASONABLE DOUBT.

4. The defendants, as the first ground for the relief that they seek, urge broadly that the People have not proved their guilt beyond a reasonable doubt. They do not specify the manner in which, allegedly, the proof was defective. This Court cannot, at this time and on these motion papers, entertain this ground. Section 529 of the Code of Criminal Procedure provides that in applying for a certificate of reasonable doubt the "application must be founded upon the record of the cause and notice of motion duly served on the district attorney . . . ." No such "record of the cause" has been served upon the District Attorney and we have no basis for believing that any such record has been filed in this Court. Technically, therefore, this application is defective. Moreover, the application was not timely made as the same section of the Code requires th

" at least two days' notice" of motion be given, and in fact, I am informed, that the papers were served upon Assistant District Attorney Patrick W. Gallagher late in the [redacted] on October 3, 1961, giving us less than one full [redacted] of motion. The People are ready to waive both of [redacted] defects, however. But if they are to be waived, we cannot stipulate to this Court's confronting us to the sufficiency of the proof to sustain defendants' guilt. If defendants wish the proof evaluated, then they shall have to submit its delivery to this Court and to the People.

DEFENDANTS' MOTION TO DISMISS BASED ON THE FACT THAT THE PEOPLE HAVE NOT ADEQUATELY PROVED THE REQUISITE CRIMINAL INTENT.

5. The defendants contend that the People have failed to prove that their actions were executed with the intent to provoke a breach of the peace, and under circumstances whereby a breach of the peace might be occasioned. As they point out, both need not be proven. Once again, the lack of a trial transcript circumscribes this Court in ruling at this time on that contention. However, there are certain items of evidence concerning which we believe the defendants and the People are in complete accord. We submit that these items are sufficient to constitute the necessary proof of the requisite criminal intent.

6. On trial, proof was elicited that four defendants placed their bodies virtually in the chosen of the wheels of trucks that were moving to a construction site with construction materials; that three others sat in the roadway in the path of the trucks and that four others

distributed themselves in front of the entranceway to the building site thereby blocking access thereto. Several photographs, that were admitted in evidence at the trial, and that should demonstrate to this court that these defendants did "obstruct" and did "congregate . . . on a public street," will be made available to this Court on the argument of this motion. The evidence on trial demonstrated that before any defendant was placed under arrest he was requested to move, and was not arrested until he had, by his language or his conduct, refused that police request. Certainly these acts annoyed, disturbed, interfered with, obstructed, and were offensive to those [illegible] materials to the construction site in violation of Penal Law §722 (2). Certainly these acts constituted congregating with others on a public street and refusing to move on when ordered by the police in violation of Penal Law §722 (3). These are the subdivisions of the disorderly conduct section the defendants were charged with violating. It is an ancient and well established maxim in the law that "A person is presumed to intend the natural consequences of his acts."

7. The fact that a person may claim to be nobly motivated, and may indeed be so motivated, does not expiate his guilt of an intentionally committed crime or offense. In People v. Peek, 7 N.Y. 2d 76 (1959), the Court of Appeals affirmed convictions for the misdemeanor of Wilful Disobedience of an Official Order (New York State Defense Emergency Act §101), of defendants who refused to seek shelter during air raid drills in order to protest these measures.

8. The fact that, in the instant case, the police were actually able to keep order, and the fact that lawful picketing was also in progress and being engaged in by other persons, and the fact that newspaper personnel and others were also present, all of which is alleged in the third page of the Squadron affidavit, are all irrelevant. The offense of disorderly conduct may be committed although in fact no disorder erupts. It may even be committed when the defendant's conduct is designedly secretive and private. Thus the Court of Appeals reversed the vacating of a disorderly conduct conviction, when the intermediate appellate court had vacated it in an opinion which had held that a loud solicitation made to a peace officer was not done with an intent to breach the peace and therefore the necessary element of an actual or threatened breach of the public peace was lacking. People v. Hyung, 7 N.Y.2d 1030 (1960), reversing 192 N.Y.S.2d 144 (Special Sessions, App. Part, 2d Dept. 1959). See also People v. Lieberthal, 5 N.Y.2d 876 (1959).

[redacted]

9. Defendants contend that their conviction is violative of the First and Fourteen Amendments to the United States Constitution. They do not say precisely how or why. But, in sum total, they urge upon this Court that the Constitution bars the equal application of non-discriminatory laws designed to prevent public disorders in any circumstances in which the disorders may be motivated! To state this proposition is to demonstrate its absurdity. Were it to be [redacted] any Court entertaining it would, by so doing, be suggesting that the Constitution permits any person to violate any law if his motive is to attract public attention

to some alleged unfo rmess existing in his community. Our courts have expressly rejected that contention in a number of cases, See Fronia v. Ward, 207 N.Y.S. 432 (Spec. Sess. App. Part 2d Dept. 1936); People v. Friedman, 14 N.Y. S.2d 309 (Mag. Ct., 1939).

10. The defendants cite four cases in the Squadron affidavit, none of which are in point. In the case of Edwards v. South Carolina, 83 Sup.Ct. 680 (1963) the majority of the United States Supreme Court held that in fact there was no obstruction or blocking of pedestrian or vehicular traffic; they did not hold that had such blocking existed it would have been unconstitutional to convict those who participated in such a disorder. In Peterson v. Greenville, 83 Sup.Ct. , 10 L.Ed. 323 (1963) and Shuttlesworth v. Birmingham, 83 Sup.Ct. 1130 (1963), the defendants were convicted for sitting in the white section of segregated lunch counters and in Johnson v. Virginia, 83 Sup.Ct. 1053 (1963) for sitting in the white section of a segregated court room. The negro defendants were therefore convicted for acts that would not be crimes if committed by white persons. Accordingly, the convictions were reversed as violations of the equal protection clause of the United States Constitution. In Edwards (supra) at page 702, the Supreme Court noted: "We do not review in this case criminal convictions resulting from the even-handed application of a precise and narrowly drawn regulatory statute . . . ." (emphasis supplied). Implicitly the Court recognized that the laws of South Carolina and the other Southern States that were directly involved were not being applied equally to negroes and white persons and were therefore constitutionally defective. The defendants make no claim, nor can they, that the disorderly conduct laws of New York, were here applied in any way other

them indiscriminately, without regard to race or color.

[redacted]

11. Once again, the lack of a trial transcript circumscribes this court in ruling at this time on the defense contention that the defendants did not "congregate." Although the Squadron affidavit states that "The proof conclusively established that the act of the sit-down was the spontaneous and independent act of each particular defendant," I am informed by Assistant District Attorney Patrick W. McGinley that this was not the case. The defendant, Haleda Levine, who testified at the trial, stated that her presence at the construction site followed a preliminary meeting at which the decision to sit-down was left to each person, but at which the decision to block construction was made. Although it is true that no particular posts were assigned and no particular agreements reached as to sit-down positions, the actions of the defendants were not spontaneous, but the results of a pre-conceived plan to obstruct construction.

12. Indeed, even had these actions been spontaneous, this would not have mattered. Section 722, subdivision 1 deals with a person who "congregates" with others, not with one who consciously to congregate with others. Even had the "congregation" that here existed been wholly spontaneous, it would nonetheless have constituted a violation of the statute. The verb "congregate" is defined as

"To collect into a crowd, mass, assembly, or assemblage; to assemble; to mass." See Webster's New International Dictionary (Second Edition, Unabridged, 1941). Planning or conspiring is in no way involved.

13. The case of Pascale v. Carroll, 3 N.Y.2d 327 (1957), cited by defendants, is not in point. The defendants in that case had been specifically charged with violation of subdivision 2 of Section 722; the instant defendants were charged with and convicted for violation of both subdivisions 2 and 3 of Section 722 of the Penal Law; the subdivision having to do with "congregating" is subdivision 3, not at issue in the Carroll case. In reversing the conviction in that case, in which the defendants had been convicted for picketing, while wearing signs and distributing leaflets, the High Court noted that there was no demonstrated intent on their part to block pedestrian or vehicular traffic. They did not remain immobile, as did the instant defendants. The Court said:

> "Indeed, the only evidence upon which the conviction might be predicated was the arresting officer's simple statement that the defendants 'were blocking the pedestrians' right of way.' That evidence we hold to be insufficient." 3 N.Y.2d, at 322.

In the instant case, the blocking of vehicular traffic was not merely incidental to moving picketing, but the sit-downs and lay-downs of the defendants were designed to block particular trucks.

[illegible] FIFTH ALL AND BASIS --
THAT THE CONVICTION OF FOUR OF
THE DEFENDANTS MUST BE SUS-
TAINED BECAUSE "A PUBLIC STREET"
WAS NOT INVOLVED.

14. The defendants contend that as four of the defendants allegedly were not sitting or laying on "a public street" they cannot be convicted. In support of his contention, the Squadron affidavit says: "The people did not prove they committed the alleged acts, in the words of the Penal Code 'on a public street'." Here again, this Court is at a disadvantage in not having the trial transcript before it. Mr. Squadron says "that said four defendants sat down on a private street on private property owned by the New York City Housing Authority." I am informed by Assistant District Attorney Patrick W. McGinley that the testimony did not establish that four defendants sat down on a private street or on private property, as alleged by Mr. Squadron. Indeed, even had the street been privately owned, as Mr. Squadron suggests, this would not deprive it of its character as "a public street." Were it otherwise, there could be no disorderly conduct (subdivision 3) on some of the streets in Rockefeller Center or on portions of streets and places of buildings that, like the Seagram building, have been constructed far within the building line -- such property is privately owned, although dedicated to the public.

15. But even was the street deemed a private one, and even had the defendants been there located, and not on abutting public property, this would not vitiate their

conviction. All eleven defendants were convicted for violation of both subdivisions 2 and 3 of Section 722 of the Penal Law. Their sentence was imposed for this dual violation. Subdivision 2 contains no reference whatsoever to "a public street." Hence even had some defect existed in the conviction of the four defendants named in the Squadron affidavit for violation of Section) of the disorderly conduct section, there is no defect as to their conviction for violating subdivision 2 of the very same statute, and their sentence hence is not even arguably unlawful.

DEFENDANTS FURTHER ALLEGE BASIS -- THAT THE TRIAL COURT ERRONEOUSLY EXCLUDED CERTAIN EVIDENCE.

16. At page 5 of the Squadron affidavit it is alleged that the trial court erroneously excluded some of the evidence proffered by the defendants. The trial transcript, were it available, would reveal that defendants tendered this evidence as indicative of discriminatory practices in employment in city construction work. The trial court excluded this evidence. I am informed that it was contended by the defendants that this evidence would be demonstrative of the noble motive allegedly entertained by these defendants. Defendants cite absolutely no authority in support of their proposition that an allegedly noble motivation may vitiate an otherwise criminal act. Indeed, as has been pointed out, there can be no authority for such a proposition. Hence the proffered evidence was properly excluded. Motive properly is considered by the trial court at the time of sentencing, only.

17. Many years ago, Justice Benjamin N. Cardozo noted: "One of the most fundamental social interests is that law shall be uniform and impartial." See Nature of Judicial Process, 112 (1922). To suggest that these defendants may lawfully intentionally commit a disorderly act, but that our laws prevent other persons from so doing, because of alleged differences in motivation -- the subjective operation of individual minds -- would be to depart from such uniformity and impartiality. Indeed, this has been recognized by the leaders of the powerful civil rights movement presently sweeping America. They have uniformly spoken unequivocally against lawlessness. Speaking in Washington, D.C. on August 28, 1963, on the occasion of the March of 200,000 people on the Nation's Capitol, the Reverend Martin Luther King stated that: "In the process of gaining our rightful place we must not be guilty of wrongful deeds." Writing in the New York Times Sunday Magazine section, on August 18, 1963 (at page 16), Jack Greenberg, the Director of the Legal Defense and Educational Fund of the National Association for the Advancement of Colored People, stated: "Some of the responsible organizations has advocated the breaking of the law." See "An N.A.A.C.P. Lawyer Answers Some Questions." In a pamphlet published in August, 1963, entitled, "How Americans Protest," commenting on then current sit-ins blocking construction sites, the American Civil Liberties Union stated "Each of these violated legal protections of the public's right of movement and thereby exceeded the limits of constitutionally protected activity. The ACLU does not support such excesses;

specifically we believe that physical obstruction of the right of movement does not merit civil liberties protection."

10. These defendants knowingly refused to obey the law when they committed their disorder on August 1, 1961, having been convicted for that disorder, they were fined $25 apiece. The [illegible] affidavit neither suggests any financial inability on the part of any of these defendants to pay that fine. The sole question now is whether they will pay it and by so doing acknowledge their subservience to the majesty of the law. Having been convicted, with no reasonable excuse existing for believing that any error was committed in the course of that conviction, they should now be compelled to heed the law's requirements and pay their fine.

10. We submit that there is no possible basis for reversal but should there be a reversal the defendants will have their fines remitted and will have sustained no permanent injury. In granting a certificate in the case of Pernia v. Gleason et al, on September 12, 1963, your Honor noted that the defendants in that case had been sentenced to short jail terms and should their convictions thereafter be reversed they would have no recourse that would make them whole again, having served their time. The instant defendants, facing a fine which they do not claim to be unable to pay, are obviously not in a similar position.

Sworn to before me this
[illegible] day of [illegible] 1963.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- - - -

[illegible]

[illegible]

[illegible]

At a Term of the Supreme Court of the State of New York held in and for the First Judicial District at the Criminal Courthouse in the City of New York in said District on the day of October, 1963.

PRESENT:

HON. J.S.C.

STATE OF NEW YORK,

Plaintiff,

- against -

SARA E. PENN, HELENA L. LEVINE, BARBARA PEARSON, EDWARD V. FITT, EUGENIA T. GARSON, CLAUDIO BARRO, THOMAS MACKENNA, MICHAEL CHAIKIN, EUGENE T. MAGEE, DAVID FEVRIER and SAUL GOTTLIEB,

Defendants.

An application having been made at the above-mentioned term of this Supreme Court upon the record of the trial had in Criminal Court of the City of New York, County of New York, at which the above-named defendants were convicted of the offense of disorderly conduct in violation of Section 722, sub-divisions 2 and 3 of the Penal Law of the State of New York; and upon the reasons set forth in the accompanying affidavit herein of Howard N. Squadron, Esq., verified the 3rd day of October, 1963 that a certificate of reasonable doubt issue herein to said defendants,

and that the said defendants be admitted to bail pending an appeal from such convictions; and said application having been duly considered upon its merits; and after hearing Howard M. Squadron, Esq., attorney for defendants, in favor of said application; it is hereby

ORDERED that said application be and the same hereby is granted, and that a certificate of reasonable doubt issue in favor of said defendants, and that each of said defendants be admitted to bail in the sum of $50.00, or other sum heretofore set for them pending and during trial.

_____

J. E. C.

THE FOLLOWING PAGE(S) ARE THE BEST COPY AVAILABLE.

SUPREME COURT : NEW YORK COUNTY
SPECIAL & TRIAL TERM : PART XXI

- -x

THE PEOPLE OF THE STATE OF NEW YORK

- against -

ABBA P. PEEN, HELENA L. LEVINE,
BARBARA FINNEY, EDWARD T. [illegible],
JUANITA T. CARSON, CLAUDIO HINOJO,
THOMAS McKENNA, MERYL CHATKIN,
ANTHONY T. BLOOM, DAVID RIVERA
and SAUL GOTTLIEB,

Defendants.

- -x

GELLER, J.:

This is an application for a certificate of reasonable doubt pending appeal to the Appellate Term, First Department, from the conviction of the eleven defendants of the offense of disorderly conduct. The certificate may be granted only if the court is of the opinion that "there is reasonable doubt whether the judgment should stand, but not otherwise" (Code Crim. Pro. §527, emphasis supplied).

Although such an application is to be "founded upon the record of the cause," the trial minutes have not been submitted. Defendants' attorney has set forth in brief and summary fashion the evidence presented at the trial, while urging that, among the grounds of alleged error, the people did not prove guilt beyond a reasonable doubt nor intent to provoke a breach of the peace and under circumstances whereby a breach of the

peace might be maintained nor congregating with others on a public street and refusing to move on when ordered by the police. It is also urged that the court below erroneously excluded certain evidence. The principal point relied on is the contention that defendants' conviction is in violation of their constitutional right of peaceful protest against discrimination in the construction industry.

The district attorney has taken the position that, as to certain of the grounds raised, he disputes in some respects the version of the record stated by defendants' attorney and maintains that such grounds for a finding of reasonable doubt cannot be properly sustained in the absence of the record. He has indicated, however, on the argument as well as by his papers, which deal with each of the grounds raised, that he is meeting the issues on the merits.

On the basis of the submission thus made it appears that these eleven defendants either sat in the roadway in the path of trucks moving to a construction site or in the shadow of their wheels or in front of the entranceway to the site; that they blocked access thereto; and that they refused to move when ordered by the police. It could also appear that, while these defendants were

sincerely motivated by the desire to end discrimination in the construction industry, they may nevertheless be found guilty under the charge if they proceeded to act beyond the permissible limits of peaceful protest and committed specific acts in violation of law.

That is the clear distinction made in Edwards v. South Carolina (83 Sup. Ct. 680, 1963), wherein convictions were reversed because the court found that defendants had merely exercised their constitutionally protected rights of free speech, free assembly and free petition. It was expressly noted that "there was no obstruction of pedestrian or vehicular traffic."

Furthermore, it cannot and is not contended that the statute involved is in any sense discriminatory nor is it claimed that it was here applied in a discriminatory manner.

It appears that other persons parading and picketing at this site were not disturbed by the police. These defendants, however, went beyond that. From what is set forth in the papers the court does not have a "reasonable doubt" as to defendants' intent, as distinguished from motive, to provoke a breach of the peace by obstructing traffic or as to the nature of their acts whereby such breach of the peace might be occasioned; nor as to

their congregating and refusing to move on when ordered by the police. The court cannot find a basis for reasonable doubt on this showing regarding defendants' intent to obstruct the trucks, as indicated by their deliberate acts and their refusal to move aside when requested by the police. Hostility of motive cannot excuse an illegal act, though it may be taken into consideration at the time of sentence.

With respect to the evidence excluded, it appears from counsel's own statement that it related to the matter of motivation and as such was properly held to be immaterial.

Finally, it should be noted that defendants were each sentenced to pay a fine of $25 or, in default thereof, five days in the workhouse. Thus, there is not present here the consideration that a defendant sentenced to imprisonment would be without remedy if his application for a certificate of reasonable doubt were denied and his conviction subsequently reversed on appeal — a factor which might, under certain circumstances, convert some doubt into a reasonable doubt. Here each of the defendants posted bail in the lower court in the amount of $50 cash. The payment of the $25 fine at this time would not work any harm since, should there be a reversal of their convictions, they will have their fines remitted.

It should also be noted that the circumstances here differ from those found to be present in Keeple v. Cannon et al (N.Y.L.J., September 25, 1963), wherein I did grant a certificate of reasonable doubt in a case involving a multiplicity of eight defendants for disorderly conduct allegedly committed in the course of a civil rights demonstration.

This application is therefore denied.

Dated: October 9, 1963

J.F.C.

February , 1964

Dear Defendant:

In order to expedite the appeals from convictions resulting from last summer's civil rights demonstrations in New York County, I have been requested by Carl Rachlin, Esq., General Counsel to CORE, and the attorneys who appeared for you and other defendants at trial, to prepare a stipulation with the District Attorney. A copy of the stipulation is enclosed.

This stipulation affects your rights in the following way:

The case of People vs. Penn was a Rutgers sit-down case tried by Howard Squadron, Esq., as attorney for defendants. The case, in the opinion of the undersigned and other counsel, raises all of the basic legal issues involved in the demonstration cases. The appeal in this case has already been briefed and argued in the Appellate Term. If this case should be affirmed in the Appellate Term, an appeal will be taken to the Court of Appeals. No decision has yet been made, whether a petition for certiorari will be filed, if that should be necessary.

Counsel believe that the Penn case is a good selection as the basic test case on these issues.

The stipulation, in effect, binds you to be the outcome in the Penn case, except that if your sentence exceeded five days and if the Penn case is affirmed, your right to appeal on the ground of excessiveness of sentence is preserved. If the Penn case should be remanded for a new trial, the effects of the stipulation terminate since it cannot now be anticipated what the people or the defendants in the Penn case, or we, will desire to do in that event.

By agreeing to the stipulation you are therefore waiving the right to have your appeal separately presented, except in certain events. On the other hand, should the Penn appeal be successful, you will have the benefit of that success

without the necessity of independent proceedings.

I, and the other counsel mentioned above, request that you consent to the stipulation. We request it as being in your best interest. It will save considerable time, duplication of effort and money.

Further, the trial record in the Penn case is one of the best of all those compiled in these cases and is, from a technical standpoint, superior.

I would, therefore, appreciate your signing and returning to me as quickly as possible the enclosed consent form. If you have any question, please call me.

Sincerely yours,

George Schiffer

Encl.

February , 1964

I hereby authorize GEORGE SCHIFFER, ESQ., to act as my attorney for the purpose of signing the stipulation annexed hereto and for the purpose of taking all steps contemplated by the stipulation.

_____

Address: _____

_____

W I T N E S S :

_____

STIPULATION

WHEREAS the case of People vs. Penn et al. has been briefed and argued on February 5, 1964, in the Appellate term of the Supreme Court, and

WHEREAS basic principles of law were therein raised, and

WHEREAS there are presently pending several other appeals to the said Court from convictions had on various dates in the Criminal Court of the City of New York, which are listed in schedules "A" and "B" annexed hereto and made a part hereof; and

WHEREAS the cases listed in these schedules, although they involve independent incidents and occurrences, are nevertheless governed by points of law presented to this Court in People vs. Penn; and

WHEREAS the parties hereto subscribed are desirous of an expeditious determination of the issues in all cases;

IT IS HEREBY STIPULATED AND AGREED by and between FRANK HOGAN, District Attorney of New York County and GEORGE SCHIFFER as attorney for the defendants listed in schedule "A" that:

1. (a) If the case of People vs. Penn is affirmed by the Court of Appeals and by the United States Supreme Court, then the defendants listed in schedule "A" shall withdraw their appeals.

(b) Within ten days after the order of the Court of Appeals affirming People vs. Penn is entered (if such an order is made) attorney for defendants shall

advise the District Attorney whether or not it is intended to petition for certiorari in People vs. Penn. If a petition is not to be filed in People vs. Penn, then the appeals of the defendants listed in sehedule "A" shall be withdrawn five days after the date of the notice to the District Attorney. If a petition is filed, but denied, or if the petition is granted but People vs. Penn is affirmed, then the appeals of the defendants listed in schedule "A" shall be withdrawn within five days after the entry of the Supreme Court's order. In any of such events, the defendants listed in schedule "A" shall surrender to serve their sentences (if any) or shall pay the fines imposed upon them (if any), no later than five days after the withdrawal of their respective appeals.

2. If People vs. Penn is reversed by the Court of Appeals or by the Supreme Court with mandate to dismiss or by this Court in such circumstances that the People have no right to appeal or the People determine that they will not appeal, then the appeals of the defendants listed in schedule "A" shall be consolidated and the People and defendants shall state to the Court that the case of People vs. Penn governs the consolidated appeals and that the convictions should be reversed and the complaints dismissed. Such action shall be taken within fortyfive days after the entry of the respective order.

3. If People vs. Penn is reversed and remanded, then all proceedings in the cases listed in schedule "A" shall be deemed adjourned until the 31st day after the entry of the remanding order.

IT IS FURTHER STIPULATED AND AGREED by FRANK HOGAN, District Attorney of New York County and GEORGE SCHIFFER as attorney for the defendants listed in schedule "B" that the foregoing stipulations shall apply to the defendants listed in

schedule "B" subject to the following additional stipulations:

4. In the events contemplated in paragraph 1(a), defendants listed in schedule "B" shall either comply with the provisions of paragraph 1(b) or shall, within fifteen days after the entry of the order or affirmance of the Court of Appeals or the United States Supreme Court, or the order denying the petition for certiorari (whichever shall last occur),notify the District Attorney of defendants' intent to prosecute their appeals on the issue of excessiveness of sentence only. Such appeals shall be perfected within thirty days after the date of such notice. Such appeals shall be predicated on the entire records and on the additional information before the sentencing court.

IT IS FURTHER STIPULATED AND AGREED that pending the occurrence of the events herein contemplated, the appeals of the defendants listed in schedule "A" and the defendants listed in schedule "B" shall be held in abeyance, subject to restoration on notice by the District Attorney consistent with this stipulation.

Dated : New York, New York
March , 1964.

FRANK HOGAN
District Attorney
County of New York

GEORGE SCHIFFER
Attorney for Defendants

CIVIL DISOBEDIENCE CASES

SCHEDULE "A"	NOTICE OF APPEAL FILED	5 DAYS OR LESS
Stephen Kosloff	Aug. 7, 1963	5 days
Max Hardman	Aug, 7, 1963	5 days
Jose Morales	Aug. 7, 1963	5 days
Dante Fiorello	Aug. 7, 1963	5 days
Athamasion Levidietis	Sep. 10, 1963	$25 or 5 days
Barbara Weill	Sept. 10, 1963	$25 or 5 days
Martha Dillard	Sept. 10, 1963	$25 or 5 days'
Gerald Lesser	Sept. 10, 1963	$25 or 5 days
Paul A. Bebral	Sept. 10, 1963	$25 or 5 days
Robert Brown	Aug. 2, 1963	5 days+30days SS
Joseph Jackson, Jr.	Aug. 2, 1963	5 days+30days SS
Janet Schwartz	Sept. 10, 1963	30 days SS
Nicassio Martinez	Sept. 10, 1963	30 days SS
Robert Hurwitt	Sept. 10, 1963	30 days SS
Sheila Brown	Aug. 2, 1963	5 days+30days SS

SCHEDULE "B"	NOTICE OF APPEAL FILED	6 days of more
Michael Schwerner	July 25, 1963	60 days
Lisa Henry	July 25, 1963	60 days
Samuel Friedman	July 25, 1963	60 days
Rita Schwerner	July 25, 1963	30 days
Harold Kersten	July 25, 1963	30 days
Robert Gore	July 26, 1963	60 days
Walter Flesch	July 26, 1963	60 days

SCHEDULE "A"	NOTICE OF APPEAL FILED	5 DAYS OR LESS
Sara Penn	Oct. 11, 1963	$25 or 5 days
Helena Levine	Oct. 11, 1963	$25 or 5 days
Barbara Plislcow	Oct. 11, 1963	$25 or 5 days
Edward Pitt	Oct. 11, 1963	$25 or 5 days
Benita Cannon	Oct. 11, 1963	$25 or 5 days
Claudio Ramos	Oct. 11, 1963	$25 or 5 days
Thomas McKenna	Oct. 11, 1963	$25 or 5 days
Meryl Chatkin	Oct. 11, 1963	$25 or 5 days
Isadore Bloom	Oct. 11, 1963	$25 or 5 days
David Rivera	Oct. 11, 1963	$25 or 5 days
Saul Gottlieb	Oct. 11, 1963	$25 or 5 days
Jeffrey Glick	Sept, 12, 1963	30 days SS
Steven Frieder	Sept. 12, 1963	30 days SS
Alexander Boyer	Sept. 9,1963	5 days
Antonio Vasquez	Sept. 9, 1963	5 days
Charles Saunders	Jan. 20, 1964	$25 , SS
Ernest Russell	Jan. 20, 1964	$25 + SS
Willie Holton	Jan. 20, 1964	$25 + SS

SCHEDULE "B"		6 Days or More
Vicki Morris	Sept. 12, 1963	10 days 30days SS
Elizabeth Elkind	Sept. 12, 1963	10 days 30days SS
Raymond G. Gardner	Sept. 12, 1963	10 days 30days SS
Lester Williams	Sept. 12, 1963	10 days 30days SS
Willie Blackman	Sept. 12, 1963	10 days 30days SS
Jules Older	Aug. 12, 1963	30 days
Joel Freedman	Sept. 9, 1963	10 days
Jeffrey Kalb	Sept. 9, 1963	10 days
Eleuterio Gonzalez	Sept. 9, 1963	10 days
Stuart Wechsler	Jan. 20, 1964	10 days, SS

SCHEDULE "A"	NOTICE OF APPEAL FILED	5 days or less
Joseph Lawson	May 30, 1963	Pen Ind. SS
Kurt Flashmer	May 30, 1963	Pen Ind. SS
Stevens Clark	May 30, 1963	Pen Ind. SS
Wesley Sutton	May 30, 1963	Pen Ind. SS
Vicki Morris	May 30, 1963	Pen Ind. SS
Velma Hill	May 30, 1963	Pen Ind. SS
Elizabeth	June 3, 1963	1 Year SS
Krin Berg	June 3, 1963	1 year SS
Edwin Lewinson	June 3, 1963	1 year SS
Stuart Wechslen	June 3, 1963	1 year SS
Patricia Walker	June 3, 1963	1 year SS
Gloria Bouknight	June 3, 1963	1 year SS
Christopher Peditto	June 3, 1963	1 year SS
Charles Wilson	June 3, 1963	1 year SS
Jane Burnett	June 3, 1963	1 year SS
Maurice Fredericks	June 3, 1963	1 year SS
Gilbert H. Banks	June 3, 1963	1 year SS
Arnold Goldwag	June 3, 1963	1 year SS
Thad Beebe	Nov. 8, 1963	$25 or 5+90days SS

Schedule "B"

None

COPY

Appellate Term of the Supreme Court,
First Department

FEBRUARY,1964

Present: Hon. WILLIAM C. HECHT,JR. J.P.
" LOUIS J. CAPOZZOLI,
" SAMUEL H. HOFSTADTER,
Justices

FILED
Oct. 15,1964
APPELLATE TERM

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

SARA E. PENN, HELENA L. LEVINE,
BARBARA PLISKOW, EDWARD W. PITT,
BENITA T. CANNON, CLAUDIO RAMOS,
THOMAS McKENNA, MERYLCHATKIN,
ISIDORE T. BLOOM, DAVID RIVERA, and
SAUL GOTTLIEB,
Defendants-Appellants.

No. 45

HOWARD M. SQUADRON, ESQ.
For the Defendants-Appellants.

Appeal by defendants from judgments of conviction of the Criminal Court of the City of New York, County of New York, after a joint trial, of violating Section 722, subdivisions 2 and 3 ofthe Penal Law (disorderly conduct) PER CURIAM:

Judgments of convictions against all defendants affirmed.

****

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT, FEBRUARY 1964
HECHT, CAPOZZOLI, HOFSTADTER, JJ.

PEOPLE OF THE STATE OF NEWYORK, v. SARA E. PENN, et al.

CAPOZZOLI, J.: No. 45

The instant appeal arises out of incidents of alleged disorder connected with a racial protest by these defendants against illegal discrimination in the building trades unions. These incidents occurred on Rutgers Street and on an access road leading to a wire fence containing the entrance to a building site where public housing was in the course of construction.

On the basis of the evidence adduced at the trial, the Court below found that these defendants darted into the path of trucks which were delivering construction material; some of them sat in front of and under the wheels of the trucks and others sat in front of the gate leading tothe housing site itself. These actions interfered with the movements of the trucks so that they came to a complete stop and they were prevented from proceeding to their destination. The evidence also established that the defendants refused to obeythe instructions of the police to move out of the way so as to allow the trucks to proceed. On the basis of the total evidence adduced the Court found all the defendants guilty of a violation of Sec. 722, Subds. 2 and 3 of the Penal Law of the State of New York (disorderly conduct).

It is the contention of thedefendants on this appeal that the evidence in the court below was insufficient to support the convictions; that they are protected by the First and 14th Amendments to the Constitution of the United States and that Sec. 722 of the Penal Law has no application to their actions.

There was no real dispute below as to the evidence. The defendants admitted that they deliberately placed themselves in sitting positions before the entrance gate to the

building site and also on the street, directly in front of the trucks and the wheels thereof. There is no dispute that their "sit-down" conduct stopped and prevented the trucks from entering the site.

Such conduct was not normally to be anticipated. It constituted a disturbance of the public order by acts likely to produce violence and cause consternation and alarm. There is enough shown from which it can reasonably be seen that, had an adequate number of police not been present, the conduct of the defendants might have been retaliated by the truck drivers or others with serious consequences to the peace of the community.

The further conduct of the defendants in refusing to remove themselves from their obstructionist sitting positions, after repeated requests and entreaties by the police officers, and after being repeatedly warned by the police that the conduct of the defendants violated the law and that theycould be arrested therefor, were all calculated to, and did in fact, violate Sec. 722. There is no question but that the defendants, by their conduct and acts, annoyed, disturbed, interfered with and obstructed others (the truck drivers) by acts likely to produce violence and cause consternation and alarm, all of which tended to a breach of the peace. (Penal Law, Sec. 722, subd. 2.) They also violated subd. 3 of the statute by congregating on a public street and refusing to move on when ordered to do so by the police.

A review of the record belowdiscloses ample evidence to justify the convictions of the defendants.

The defendants strongly contend that their actions were legal and not subject to prosecution, because they desired to drmaatize the impairment of civil rights by labor unions in the building trades, and to call attention to acts of discrimination by them against negroes. They further argue that they were engaged in a peaceful protest against these acts of discrimination and were engaged in an effort to have the laws prohibiting discrimination enforced. That in doing so, they maintain, they are protected by the United States Constitution as a proper exercise of free speech, proper exercise of the rights of public assembly and to petition for redress of grievances under the First and 14th Amendments. In support of their position they cite the cases of Edwards v. South Carolina, 372 U.S. 229 (1963); Shuttlesworth v. Birmingham, 373 U.S. 262 (1963); Peterson v. Greenville, 373 U.S. 244 (1963); Johnson v. Virginia, 373 U.S. 61 (1963) and Lombard v. Louisiana, 373 U.S. 267 (1963).

An examination of those cases discloses that the reliance by the defendants upon them is entirely misplaced. The facts in the case atbar are so obviously different from the facts in all of the last cited cases as to render the sound holdingsof those cases clearly inapplicable to the behavior of these defendants.

This Court is not faced with an orderly, quiet lunch-counter sit-in which violates an unconstitutional city ordinance requiring the separation of the races in restaurants (Peterson v. Greenville, supra); or which violates an "official command which has at least as much coercive effect as an ordinance" and which directs the continuance of segregated services in restaurants (Lombard v. Louisiana, supra, p.273); nor isthe Court dealing with a conviction for aiding and abetting persons to engage in an orderly sit-down demonstration (Shuttlesworth v. Birmingham, supra); neither is the Court dealing with a contempt conviction which rests upon a negro's refusal to comply with the segregated seating requirements observed in a courtroom (Johnson v. Virginia, supra); wherein petitioner was held in contempt for being "peaceably seated in the section reserved for whites" (p.62). Nor do we have the situation which was presented in Edwards v. South Carolina, supra, where there was an assembly of negroes to peaceably express their grievances and where the court specifically found that "there was no violence or threat of violence" and further found "there was no obstruction of pedestrian or vehicular traffic * * * no vehicle was prevented

from entering or leaving*** the area of the demonstration" (pp. 231, 232).

As against these last cited cases let us consider the case of People v. Stover, 12 N.Y. 2d 462. In that case defendants placed a clothes-line filled with old clothes and rags in the front yard of their home, in violation of an ordinance of the City of Rye prohibiting the erection and maintenance of clothes-lines or other devices for hanging clothes in a front or side yard abutting a street. When prosecuted therefor the defendants urged, amongst other things, that the ordinance was unconstitutional and that it interfered with their right of free speech as guaranteed by the First Amendment. In passing upon this contention of the defendants the Court said:-

> "*** This form of nonverbal expression is, we shall assume, a form of speech within the meaning of the First Amendment. (Citing cases) However, it is perfectly clear that, since these rights are neither absolute nor unlimited (citing cases), they aresubject to such reasonable regulation as is provided by the ordinance before us. Although the city may not interfere with nonviolent speech, it may proscribe conduct which incites to violence or works an injury on property, and the circumstance that such prohibition has an impact on speech or expression, otherwise permissible, does not necessarily invalidate the legislation."

In the case of Trans-Lux Distributing Corp., v. Board of Regents, etc., 14 N.Y. 2d 88, at p. 91, the Court said:-

> "*** while conduct may be speech, it still remains conduct and does not cease to present its unique problems of social control. It is now the law that even peaceful picketing may be forbidden where it violates State Labor laws that are not themselves designed as restrictions on freedom of speech (citing case). Conduct that is proscribed for valid public purposes is not immune merely because engaged in with a view to expression (Giboney v. Empire Storage Co., 336 U.S. 490.)"

The holding in the last two cited cases is directly contrary to the position taken by the defendants.

In the case of Gaynor, et al, v. Rockefeller, et al, 21 App. Div. 2d 92, the unanimous opinion of the Court indicated that racial policies of exclusion by some of the building industry unions "are of so long duration and so widely known that the courts might, if they so elected, take judicial notice of the fact* * * (p.100). The Court then indicated that the law provides punishment for business or labor organizations which discriminate unlawfully, citing Penal Law, Secs. 514 and 701; Civil Rights Law, Secs. 41, 43; Labor Law, Sec. 220-e, Subd. c.

It is, therefore, apparent that these defendants had legal avenues open to them to bring about the objectives they seek.

While it is true that the Supreme Court of the United States has held that public grievances are within the constitutional protection of the First Amendment, it has also held that the manner of protest is subject to reasonable regulation and control in the interest of public safety and order. (Cox v.N.Hampshire,312U.S.569; Giboney v.Empire Storage,336 U.S.490;Cantwell v.Conn.310 U.S.296).

Also see: People v. Galamison, 43 Misc. 2d 72; People v. Martin, 43 Misc. 2d 355.

In Cox v.N. Hampshire, supra,at p.574, The Court said:-

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. * * *".

In Giboney v. Empire Storage Co., supra, at p. 498, the Court said:-

> "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to * * * conduct in violation of a valid criminal statute. We reject the contention now. * * *".

In Cantwell v. Connecticut, supra, at page 308, the Court said:-

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish isobvious.***".

In People v. Martin, supra, at p. 357, the Court said:-

> "Thus, although the Supreme Court has decreed that the Fourteenth Amendment prohibits a State from making criminal the peaceful expression of 'unpopular views', this does not imply that persons wishing to exercise the right to express their views may comport themselves in a manner which will constitute disorderly conduct as defined in our penal statutes."

The defendants attempted to equate their actions with peaceful picketing. Of course, if they were engaged in peaceful picketing, the actions of the police in arresting them would have been illegal. But were they engaged in peaceful picketing? That term implies peaceful, non-provocative. Can it honestly be contended that the acts of the various defendants, in placing themselves under wheels of the trucks and otherwise interfering with the progress of the trucks, were peaceful? Is it seriously claimed that such behavior would not tend to possible violence on the part of those against whom these acts were directed and thereby breach the peace? These questions pose their own answers.

The defendants argue that, since their purpose was to bring to the attention of the public and the authorities acts of a discriminatory nature, they had a perfect right to perform the acts of which they stand convicted, despite the prohibition of law, and no conviction may result therefrom. Certainly this Court is sympathetic with the objectives whcih these defendants sought to achieve and it recognizes the justness of their cause and their well-intentioned motives. However, this Court is limited as to the power it may exercise in the case at bar. It can only review the record and base its conclusion upon that record within the law as it is applicable thereto. It cannot engage in a dissertation of the philosophical and sociological questions which would be raised by a consideration of the objectives which these defendants sought to attain by engaging in acts which violated the law. It can only apply the existing law to the facts found below. If the evidence shows a violation of the law by these defendants, then the reason why they broke the law is immaterial and irrelevant.

The Court realizes that the defendants were motivated by a desire to dramatize the impairment of civil rights in the area covered by the activities of the building trades unions in the construction industry, but it simply cannot justify their behavior. To condone their actions would constitute each one a judge of what law he will obey and what law he will not obey, depending upon his own personal convictions of right and wrong. Permitting this would constitute an abandonment by society of the rule of law, give support to lawlessness and invite anarchy.

Civil rights can be as much endangered by illegal methods used in an attempt to gain them, as they are by those who would deny them altogether.

The dissenting opinion criticizes the joint trial of these defendants by the trial court and concludes that it resulted in a denial to the defendants of a fair trial. A number of cases are cited in support of this conclusion. An examination of those cases discloses that in some what was considered was not joinder of defendants, but joinder of counts and in the others the facts are entirely dissimilar from the facts in the case at bar. The fact is that every defendant stipulated with the People to hold a joint trial and the record clearly shows that every defendant was convicted on the basis of the particular evidence adduced against his own actions. It is interesting to note that this point is not raised on this appeal by any of the defendants.

For the reasons hereinabove expressed the convictions against all of the defendants are affirmed.

HOFSTADTER, J. (Dissenting):

I dissent and vote to reverse the judgments of convictions.

I know that my bretheren not only are tolerant of opposing views in themselves but cordially embrace the free expression of them. Indeed, such freedom of expressing all viewpoints, whether acquiescent of dissident, is not only a duty but the reward of service in a multiple court.[1] In an ancient and highly developed system of law, it was a rule that a court that was uniformly unanimous was one to be shunned - it was dissolved and its membership reconstituted. In our country dissent is regarded as salutary for the development of sound judicial principles - yesterday's dissenter may be tomorrow's majority.

In a notable dissent in Malloy v. Hogan(_____ U.S. _____; 84 S. Ct. 1489) Mr. Justice Harlan declared: "Believing that the * * * * court's decision carries extremely mischievous, if not dangerous consequences, * * * I must dissent. The importance of the issue presented and the serious incursion which the court makes on * * * basic constitutional principles justifies a full exposition of my reasons." I regard this expression as apposite here.

Eleven defendants tried together in an omnibus trial -- though none was charged with acting in concert or congregating with any of the others -- have been convicted of disorderly conduct (Penal Law, §722[2],[3]).[2]

In a case involving demonstrations by Bronx housewives against the seller of bread at alleged exorbitant prices -- in the depression year 1934 -- I took occasion to observe: "The right of an individual or group of individuals to protest in a peaceable manner against injustice or oppression, actual or merely fancied, is one to be cherished and not to be proscribed in any well-ordered society. It is an essential prerogative of free men living under democratic institutions. And it is salutary for the State in that it serves as a safety valve in times of stress and strain."(Julie Baking Co. Inc. v. Graymond, 152 Misc. 846, 847). If this was a novel proposition when uttered, it soon ceased to be such with the authoritative pronouncement by the U. S. Supreme Court - in 1940 - in Thornhill v. Alabama, 310 U. S. 769.

Such freedom of expression nourishes the spirit and practice of civility. Man's instinctive urge to violence is thus conducted into peaceful channels.[3] "Freedom of expression is the well-spring of our civilization" (Dennis v. United States, 341 U. S. 494); and in Jefferson's felicitous phrase this includes "* * * the arraignment of all abuses at the bar of public reason." "When the channels of opinion and of peaceful persuasion are corrputed or clogged, * * * political correctives can no longer be relied on and the democratic system is threatened at its most vital point." (Jackson, The Struggle for Judicial Supremacy, 1949 Ed., p. 285)

The First Amendment is the "matrix, the indispensible condition of nearly every other form of freedom." (Palko v. Connecticut, 302 U. S. 319, 327). Its fundamental guarantees of freedom of speech, of press, of the people to assemble peace-

fully and to petition for the redress of grievances, were the first of the Bill of Rights to be secured from state abridgment by the "due process" clause of the Fourteenth Amendment (DeJonge v. Oregon, 299 U. S. 353; Grosjean v. American Press Co., 297 U. S. 233; Gitlow v. New York, 268 U. S. 652; Hague v. C.I.O., 307 U. S. 496; see also Steelworkers v. Labor Board, 376 U. S. 492 and Sullivan v. Times, 375 U. S. 803). The counterpart of the great canon is to be found in our State Constitution -- Art. I, §§8,9.

In this light, the convictions here are ill founded -- the demonstrators against notorious and long-standing racial discrimination were within constitutional protection. Moreover, properly construed and applied, the statute against disorderly conduct was not violated. Finally, procedural irregularity and substantial error on the trial, in any event, vitiate the judgments. Preliminary to dealing with these matters -- in inverse order -- let us look at the record.

The incidents complained of occured on August 1, 1963, approximately an hour apart -- at about 10:00 A.M. and 11:00 A.M. -- at the site of a gate leading to a public housing project then under construction at Madison and Rutgers Streets in Manhattan. Picketing had commenced at about 6:00 A.M. A large detail of police were present. By ten o'clock members of the public were across the street, and press reporters and photographers were in the area. Wooden "horses" were used as boundary markers of the picketing permitted by the police. From Rutgers Street a private access road or driveway led to a wire fence containing the entrance gate to the project. The gate was kept closed except to give entry to vehicles. Rutgers Street traffic was not impeded. While passing vehicles slowed down to observe what was going on, officers in the street expedited their movement to keep the roadway clear.

To traffic in clarity, we must divide the defendants into two groups; and the interests of justice require a further particularization of the individual acts of the several defendants. Defendants Penn, Pitt, Pliskow and Levine partook of the incidents at 10:00 A.M. -- and they were arrested shortly after that hour. Defendants Cannon, Ramos, McKenna, Chatkin, Bloom,Rivera and Gottlieb partook of the incidents at 11:00 A.M. -- and they were arrested thereafter. The acts of the defendants differed!

The ten o'clock incidents all took place in front of the fence bordering the project. As a cement-mixing truck on the driveway approached the gate, defendants Levine, Penn, Pliskow and Pitt sat down in front of the fence. Only one -- possibly two -- of these defendants sat in front of the gate; neither of the others did so. All were some fifteen feet from the truck. A photograph (Exhibit 1) shows all these defendants sitting quietly, doing nothing. The driver of the truck testified that he heard no loud or boisterous language -- they were singing. He remained in the truck when the defendants were requested to leave. Upon their refusal to do so, they were arrested and walked quietly to the police wagon.

The entire episode had taken about fifteen minutes.

The driver had been inconvenienced briefly; the police were not opposed. The incidents took place not on the public street but on a private driveway. There was no actual breach of the peace -- nor reasonable apprehension of it!

Further clarification requires that the "eleven-o'clock" defendants now be subdivided. Two defendants sat and one defendant lay in the private driveway leading to the fence; but there was no truck or other vehicle using the driveway at the time. Two defendants sat down in front of a cement truck in the street. Several minutes later a second cememt truck arrived and stopped behind the first one in the street. After this second truck, stopped not by the pickets but by the first truck, had come to a halt, the last two defendants sat down in front of the second truck. Again the defendants were told to move, were arrested when they remained silent and, without resisting arrest, walked quietly to the patrol wagon. None had used loud or boisterous language -- in fact, they had remained silent -- and no breach of the peace occurred. The vehicular traffic had not stopped, having been routed around the trucks by the police. Again, there was no breach of the peace nor reasonable apprehension of it.

As to defendants Ramos and Rivera, there was confusion on the trial concerning their identification; prosecution witnesses placed them in different places at the same time. It was inevitable that when the trial ended this confusion still obtained; it was compounded by like factors.

The evidence applicable to the eleven-o'clock incidents obtruded itself to tell against the defendants concerned in the ten-o'clock occurrence -- and conversely. With the best of intentions, it was impossible to judge each defendant on his own several acts; rather he was judged in a much broader frame of evidential reference. This resulted in an adjudication of a species of guilt by association. Hence, the collective trial and condemnation of the defendants were inadmissible in principle and violative of statutes (Code of Crim. Proc., SS 278, 279, 391; People v. Fringo, 13 A D 2d 887; People v. Namolik, 8 A D 2d 685; People v. Morett, 272 App. Div. 96; People v. Kanze, 200 Misc. 907; see also Allen v. Grella, 4 Misc 2d 93).

To be sure, counsel had stipulated that the defendants be tried together; this was on condition, however, not only that separate verdicts be rendered in each case, but that the testimony would be applied to each defendant only to the extent that it in fact applied to him. We have seen, however, that this became virtually impossible. There were four categories -- contingents -- of defendants who were tried together -- not even multiple individuals concerned with parallel acts during a single event. In this fact pattern, the misjoinder was so highly prejudicial and abortive of a fair trial that the interests of justice require reversal (Code of Crim. Proc., § 527; People v. Namolik, supra; People v. Lombard, 4 A D 2d 666; People v. Connors, 13 Misc. 582). "Prejudice has consistently been held to occur when * * * (joinder) embarrasses or confounds an accused in making his defense" (Pointer v. U.S., 151 U.S. 396, 403, quoted in Cross v. U.S., U.S.D.C., N.Y.L.J., Vol. 152, #3, p. 1).

The stipulation of counsel does not save the result from condemnation; it cannot avail. Our competence supercedes it - our duty transcends it! Indeed, the vice inhered in the stipulation itself - it tainted the judgment ab initio![4]

The trial court committed substantial error in rejecting evidence concerning the existence and effect of racial discrimination in employment. Defendants' acts must be judged in the context of the demonstrations then taking place -- and the right to demonstrate depended on the purpose of the demonstration (Giboney v. Empire Storage Co., 336 U.S. 490). Our Appellate Division said in Gaynor v. Rockefeller (21 A D 2d 92): "The racial policies of exclusion by some defendant unions * * * are of so long duration and so widely known that the courts might, if they so elected, take judicial notice of the fact. * * * their policies bar respondents * * * from employment in particular categories. Establishing the contention as a factual truth, in a proper proceeding, would permit legal redress" (p. 100).[5] If the fact of discrimination can serve as a predicate for redress in a civil proceeding, certainly it is relevant on such matters as wilfulness, mens rea, etc., in a criminal case. What a civil forum can take judicial notice of, surely is relevant in the context of the issue presented to a ciminal court. The trial court's restriction of the defendants' proof was grievous, reversible error.

Dealing with substantive matters, it is manifest that the defendants' acts, judged severally as they must be, did not constitute disorderly conduct under the statute. They did not act in such manner as to cause a "disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community" (People v. Most, 171 N.Y. 423,429). The conduct sought to be deterred by the Penal Law must be considerably more serious than innocent or inoffensive action (People v. Carcel, 3 N Y 2d 327). Inconveniencing pedestrians, or vehicular traffic for that matter, does not suffice (People v.Nixon,248 N.Y. 182, 187, 187-88); nor does lack of manners or good taste (ibid. p. 185). In this setting, only acts which, in the context of purpose, time, place and circumstances of the acts, would, if not stopped, actually engender a breach of the peace are within its ambit (People v. Perry, 265 N. Y. 362, 364; Bouie v. City of Columbia,----U. S.----,84 S.Ct. 1697. Otherwise, they are not to be so held (People ex rel. Clark v. Keeper of N.Y. State Reformatory, 176 N. Y. 465).

The complaint[6] was not established by the proof--and, on the proof, there was no likelihood of a breach of the peace or disorder. Defendants were said to have obstructed traffic; yet seven of the eleven defendants were not on a public street, they sat in a private driveway; two others sat before a truck which had theretofore come to a halt--and traffic was not seriously hampered. Defendants were charged with using loud and boisterous language; yet the proof was diametrically to the opposite. Defendants were accused of causing a crowd to collect; yet the evidence showed that the spectators had gathered long before either set of arrests. Their mere presence does not, of course, import punishable conduct within the meaning of section 722. In our metropolis, crowds are daily present to hear speakers, to watch a parade, to satisfy curiosity (People v. Kieran, 6 Misc 2d 245, 266). No violence occurred and none was threatened; and the numerous police were there since early that morning--they were not called because of

the defendants' acts. When arrested, the defendants submitted peacefully.

Thus, fairly evaluated, the record utterly fails as an adequate predicate for a conviction under the statute. As a matter of law, guilt under it was not estbalished in point of fact beyond a reasonable doubt. If this represents a strict view of the evidence and of the law, it is indicated in criminal cases; that course uniformly has been followed by this Court. It is also becoming in an area of grave human concern.

In any event, we are constrained by supreme authority to nullify these convictions - the defendants' conduct came within the protective shelter of the First Amendment - whatever view we might otherwise have taken of it under our State Statute. (I do not doubt that the Court of Appeals would reach the same conclusion under our state constitutional provision. Art.I, §§ 8, 9.)

We have been instructed that in interpreting a general statute regulating public conduct we are required to "resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion'". (Downum v. U. S., 372 U. S. 734,738). And that "a generally worded statute, when construed to punish conduct which cannot be constitutionally punished, is unconstitutionally vague." (Wright v. Georgia, 373 U. S. 284 at p. 293; see, also, Cafeteria Employees Union Local 302 v. Angelos, 320 U. S. 293; Stromberg v. California, 283 U. S. 359; People v. Muller, 286 N. Y. 281; Senn v. Tile Union, 301 U. S. 468). No construction of a statute is admissible which involves an inhibited application. An otherwise constitutional enactment may not be unconstitutionally enforced!

Hence, the orders of policemen could not make the conduct of the defendants, otherwise lawful, unlawful. "One cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." (Wright v. Georgia, supra, at pp. 291-292; Henry v. City of Rock Hill, 376 U. S. 776; see, also, Lombard v. Louisiana, 373 U. S. 267; Shuttleworth v. Birmingham, 373 U. S. 262; Johnson v. Virginia, 373 U. S. 61; People v. Galpern, 259 N. Y. 279, 281).

And it is equally clear that the protest need not be ineffectual to be immune from penalty. It is inherent in the constitutional guaranty that protest may be sufficiently potent to bring the grievance to the attention of the public and government. (Thornhill v. Alabama, supra, at p. 96.) The fact that the action was taken according to a preconceived plan does not make it unlawful if protected by the Constitution (Taylor v. Louisiana, 370 U. S. 154, 155-156); nor because of possible disorder by others (Henry v. City of Rock Hill, 376 U. S. 776).

Where abridgement of freedom of speech is asserted, the Court must be scrupulous to examine the effect of the challenged arrest on this basic right (see Schneider v. State of New Jersey, 308 U. S. 147, 161). "In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." (Cantwell v. Connecticut, 310 U. S. 296, 304). The issue, in each case, must be resolved whether the State interest has been pressed "to a point where it has come into fatal collision with the overriding interest protected by the federal compact" (ibid. p.307, emphasis supplied).

Only "when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears", the State may intervene (Cantwell v. Connecticut, supra p.308); absent these elements, the demonstration may not be arrested (Edwards v. South Carolina, 372 U. S. 229, distinguishing Feiner v. New York, 340 U. S. 315; Niemotko v. Maryland, 340 U. S. 268; Kunz v. New York, 340 U. S. 290; Matter of Rockwell v. Morris, 12 A D 2d 272, aff'd 10 N.Y. 2d 721, cert. den. 368 U. S. 913).

Edward v. So Carolina, supra, decided last year, has several points of striking similarity to the facts before this Court. One hundred and eighty-seven students engaged in a protest march to the State House grounds. They walked around the grounds for approximately 45 minutes, carrying placards. Vehicular traffic at a nearby street intersection was slowed down and an officer was dispatched to keep traffic moving. There were 200 to 300 onlookers, but no evidence of violence was reported. Police protection at the scene was sufficient to meet any foreseeable possibility of disorder. When the students were asked to leave, they refused and began to sing and were arrested. The Supreme Court ruled that although their conduct constituted a breach of the peace under State Law, the convictions infringed the students' constitutional right of free speech, free assembly and freedom to petition for redress of grievances, and reversed the convictions. (Followed in Fields v. So. Carolina, 375 U.S.44; s. c. 372 U.S. 522.)

The true import of Edwards may be found in Henry v. Rock Hill, supra, wherein the Court stated at pp. 777-778: "We now think Edwards and Fields control the result here. As in those cases, the petitioners here, while at a place where the state's law did not forbid them to be, were engaged in the 'peaceful expression of unpopular views' (Edwards v. South Carolina, 372 U.S. at 237). They assembled in a peaceful, orderly fashion in front of the City Hall to protest segregation. They carried signs to that effect and they sang patriotic and religious songs. Although white onlookers assembled, no violence or threat of violence occurred and traffic was not disturbed. After fifteen minutes of this, they were arrested for failure to disperse upon orders. Here, as in Edwards and Fields, petitioners 'were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court "not susceptible of exact definition"'(ibid.). And here as there 'they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community as to attract a crowd and necessitate police protection' (ibid)."

These cases foreshadowed the complex of decisions rendered by the Supreme Court in June of this year: Bouie v. City of Columbia,____U.S.____; 84 S.Ct. 1697; Barr v. City of Columbia, ____U.S.____; 84 S.Ct.1734; Bell v. Maryland,____U.S.____; 84 S.Ct. 1814; Griffin v. Maryland,____U.S.____; 84 S.C. 1770; Robinson v. Florida,____U.S.____; 84 S.Ct. 1693. In Bouie, the Court, by vote of 6 to 3, set aside the 1960 South Carolina sit-in convictions of two Negro students, five Justices holding that the students had had no fair warning that the state trespass law, prohibiting entry after warning, also applied to failure to leave after request. In Barr, the Court unanimously reversed for lack of evidence the conviction of five South Carolina sit-in students for

breach of the peace. In Bell, the Court by vote of 6 to 3, vacated the 1960 trespass convictions of 12 sit-in demonstrators at a Maryland restaurant, five Justices holding that the Maryland courts should have a chance to re-examine the convictions in light of subsequent passage of state public accommodations laws and the sixth finding their arrest and conviction unconstitutional. In Griffin the Court by vote of 6 to 3, set aside the trespass convictions of five Negroes who sat in at a Maryland amusement park, five Justices resting on the fact that a county deputy sheriff--an agent of the state--was employed by the park to carry out its policy of discrimination. In Robinson, the Court unanimously reversed the trespass convictions of 18 Florida restaurant demonstrators because state policy of segregation was embodied in a regulation requiring restaurants to have separate white and negro washrooms.

The determined intent of the High Court is unmistakably clear. Whatever the variant syntactic, juristic or philosophic patterns of these cases--and whatever the immediate context--their essential thrust--and reach--are the same; an otherwise valid state proscription is unavailing--in enforcement--when it collides with a First Amendmentguaranty made obligatory on the States by the due process clause of the 14th Amendment. Mr. Justice Brennan, writing in Malloy v. Hogan,_____U.S._____ 84 S.Ct. 1489, at the same Term for the majority, summed it up: "Gitlow v. New York (268 U. S. 652) initiated a series of decisions which today holds immune from state invasion every First Amendment protection for the cherished rights of mind and spirit --the freedoms of speech, press, religion, assembly, association, and petition for redress of grievances".

"Construction of the Federal Constitution by the Supreme Court of the United States is binding on all State Courts" (People v. Muller, 286 N.Y. 281, 284). Imbued with a sense of loyalty, a State's judiciary, to which is entrusted the high responsibility of enforcing its laws, may find it difficult to assimilate this view. But, adopting Josiah Royce's exquisite formulation of the imperative of "loyalty to loyalty" it becomes its bounden duty to follow the "supreme law of the land" which preempts any other.[7]

A reading of the cases leads me to the inescapable conclusion that irrespective of any view which may be taken of errors on the trial, its procedural irregularity or the sufficiency of the evidence--and I firmly believe they invalidate the convictions--in any even, we must reverse the convictions against these defendants on constitutional grounds.

I am loath to close--lest it seem to my brethren that I have overlooked certain matters which I know they deem important. I would render it explicit that I have notignored them. Every art in its execution requires a discriminating elimination--care must be taken to leave out nothing vital yet leave out more than is retained. The judicial discipline is an art--infinitely more than a mechanistic operation of science--which demands restraint in certain areas at certain times in the context of need. The law is replete with ambivalence in the articulation of its principles--arising from a practical regard for the actions of mankind. It may not shrink, therefore, from a corresponding moderation in the application of those principles. The dichotomy of the quest and the ideal is often resolved by aspiring to

approximation, not perfection--in what Paul Tillich calls "the ambiguity of perfection"--an adjustment to "a world of words, and compromises, and niceties of conduct."

In dealing with highly volatile forces "not merely intellectual but also passionate," the judiciary may not always find it possible to achieve a perfect solution in the interplay between dry legal considerations and dynamic social realities. It cannot always make infallibly correct judgments; it must content itself with "splendidly imperfect" ones in the anguished choice among competing goods, in the effort to potentiate and perpetuate "principles of humanity and civil liberty" (Bram v. United States, 168 U.S. 532).

For, as it has been said, there is no history without tears - and history is being written, re-written. Nor is there any mechanical yardstick - legal or otherwise - by which fundamental social re-adjustments in our country can be measured - or resolved. Progress does not move along a line of linear advance but rather in some cyclical process, a distinguished American historian observes.[8]

And, lest we forget - the fortunes of civil rights for the Negro are inextricably inter-related to the civil liberties of all Americans! In an exposition "To Be Equal", Whitney M. Young, a foremost Negro spokesman, correctly sums it up: "The negro is a barometer of whether or not the American free enterprise system really works." I think it was Herbert Spencer who insisted that: "we cannot be moral unless [until] all are moral, we cannot be happy unless [until] all are happy, we cannot be free unless [until] all are free".

The challenge is upon everybody to establish the justice of the Negro's many grievances--it is essential to racial peace. The problem must be solved by all possible skills of citizenship and government--this includes the judicial branch so far as it lies in its competence.[9]

"Every continent has its own great spirit of place. . . . Every people is polarized in some particular locality", said D. H. Lawrence. But the spirit of America transcends geography and the life of our people is polarized in "the supreme law of the land." The center of gravity of the organic functioning of our body politic resides in the Constitution - its dynamic is the imperative of equality in freedom.

In an "optative mood" - in Emerson's phrase - we discern that "at the end of the long corridor of night a crack shows beneath the door". Let us not close it. Let us rather open it wide. Too many have waited too long for too little! And let us not be afraid to listen to the voice of a new <u>experience</u> - not of a mere <u>idea</u> - the vibration of the stirring of the homunculus of the new epoch in our developing civilization - the reality of equality, not the concept alone.[10]

It has been remarked that the basic difference between the Negro protest in our country and in Africa--is that here it is not revolutionary; in a deep sense it is conservative. The negro is not agitating for a new social order but for his fulfilment in

that which already exists--and of which he has a fundamental right to be an integral part. And the "American Dilemma" can be resolved only by recognizing his inalienable right "to be equal".

In the continuing dialogue that goes on between the present and the past to shape the future, we must speak our part according to the light - and opportunity - given to us. Let us honor the call "so to speak and so to do as they shall be judged by the law of liberty."

I would reverse the convictions, remit the fines and dismiss the informations.

FOOTNOTES

1. The Sonhedrin at Usha ordained that no member could be excommunicated for his views regardless of circumstances. My revered ancestor, Rabbi, Judah Loewe (1512-1609) of Prague, who was a most passionate defender of his people and its faith in numerous dialogues declared: "One ought not reject the words of an opponent. It is preferable to seek them out and study them. Thus shall a person arrive at the *** full truth ***."

In a 6000 word dissent, Mr. Justice Storey wrote in The Nereide, 13 U.S. 388, 455: "* * * I hold it an indispensable duty not to surrender my own judgment, because a great weight of opinion is against me, a weight which no one can feel more sensibly than myself."

2. Subdivision 2 proscribed acts which annoy, disturb, interfere with, obstruct or are offensive to others; subdivision 3, congregating with others on a public street and refusing to move on when ordered by the police. The term "congregating" implies "a considerable number of persons *** or a crowd * * * and a crowd has been defined as a throng, multitude or great number of persons * * * " (People v. Carcel, 3 N Y 2d 327, 333).

3. We must be scrupulous to permit such free expression not only to abort violence but even <u>non</u>-violent resistence. Civil disobedience has a long history--going back to Ghandi, and beyond him to Tolstoy and Thoreau. The incarnation of its spirit is best expressed in the Indian word "satyagraha". This connotes not a merely negative aspect, but a dynamic one. When civil disobedience, however, involves an infraction of statute not within constitutional protection (See, Cantwell v. Conn., 310 U.S. 396), those exercising it must, in good conscience - by their own discipline- be willing to submit to the sanctions of our civil authority. But we, who are called upon to vindicate such penal sanctioning, must be discreet and sure that such an infraction has in fact occurred--beyond a reasonable doubt, a norm which obtains in all criminal cases.

4. "This idea of a fair trial has been the greatest contribution made to civilization by our Anglo-American polity. Our liberties are not based on general indeterminate phrases. They are based on practical legal rules." From an address by Professor Goodhart at the Harvard Club on June 4 under the sponsorship of American Foreign Law Association and the foreign law committee of the Association of the Bar of the City of New York.

And Brandeis wrote: "In the development of our liberty insistence on procedural regularity has been a large factor" (Burdeau v. McDowell, 256 U.S. 465, 477). Frankfurter added: "The history of liberty has largely been the history of observance of procedural safeguards" (Mc Nabb v. United States, 318 U.S. 332, 347).

5. Study of the report on discrimination in employment of the Senate Committee on Labor and Public Welfare (Report #867, 88th Cong., 2nd session, 1964) on behalf of the Association of the Bar of the City of New York led two of its committees to observe:

> "The reports indicate that non-whites earn significantly less than whites of lesser training and are frequently compelled to accept unskilled or semi-skilled jobs at low wages-jobs

which are being wiped out at an accelerating pace by automation. They find that there has been disproportionately high unemployment levels of non-whites, who comprise 11% of the labor force but 22% of the unemployed." (Report on Proposed Fed. Leg. Relating to Equal Employment Opportunity by The Committee on Fed. Leg. and the Comm. on Lqbor & Soc. Sec. Legislation, Record, Vol. 19, #5, pp. 231-232; see also, matter of Hughes - Tool Co., N.L.R.B. decision 7/2/64; Steele v. Louisiana & Nashville R.R., 323 U.S. 192; Colorado Commission v. Continental, 372 U.S. 714.)

6. The several complaints, as amended on the trial, charged that the defendant named had placed himself in a sitting position in the roadway, obstructing the free passage of vehicular traffic and had used loud and boisterous language, causing a crowd to collect; and that the complaining police officer stated in each case that he had asked the defendant to move out of the roadway on several occasions and that the defendant had refused.

"Convictions upon a charge not made would be sheer denial of due process." (De Jonge v. Oregon, 299 U.S. 353, 362.)

7. Thus it has been clear for a long time that the freedoms of the First Amendment are obligatory upon the States by virtue of the Fourteenth Amendment. It would seem that a new era is faintly dawning. The colloquy of these great canons consulting together seems to be broadening the concept of "state action" to comprehend state inaction as well. That is to say, when a state fails to accord equality or due process in the exercise of the guarantees of the First Amendment by legislation or decision, the Supreme Court may act mandatorily or by inhibition to fill the void. Congress, too, can act. Thus, the Federal legislation would be dealing with State conduct which includes inaction. Such inaction is as much proscribed by the Fourteenth Amendment as affirmative action, if it results in a denial of equal protection of the laws. At least in part, the Civil Rights Law of 1964 is based on this premise; in any event, it can be supported on that predicate. At the National Conference of Trial Judges which met last year in conjunction with the Annual Meeting of the American Bar Association, Chief Judge Desmond urged abolition of Federal Court power to release State prisoners by habeas corpus, at the same time urging that Congress enact precise constitutional requirements for State courts to apply. He was right; for, as he said, the present system causes "much confusion, much delay and * * * increase in the business of already overburdened courts." That situation, however, was not the fault of the Federal Judiciary alone; State courts had been adhering to the outmoded rule in Defore before the Supreme Court overruled Wolff and adopted Mapp; there was a vacuum in procedural regularity which had to be filled by the habeas corpus expedient. This year, at the Conference of Chief Justices meeting in conjunction with the American Bar Association gathering, Judge Desmond again called for an "objective, thorough, calm, scholarly, scientific" study of the allocation of judicial power (New York Times, August 8 and 9, 1964). Mr. Justice Brennan called on State Judges "to share fully in the job of enforcing federal constitutional rights." He suggested that if the State courts acted more vigorously to do so, friction between them and the Supreme Court would be minimized.

8. In a review of "The Quest for the Dream" by John P. Roche, he adds: "Our 20th century history (is) a story of ethnic wars of various kinds, wars incidental to transforming the old America into a multi-ethnic, multi-religious urban society. For all but the Negroes, the largest battles have been won, and the Negroes themselves have launched at last upon a campaign of self-assertion which cannot be forever denied. . . . The brutality of yesterday was not even a response to any militancy on the part of American Negroes or to any improvement in the status of the race--it was merely an ugly response to their being there at all."

9. In a recent column, Walter Lippmann says: "For an increasing number of Negroes their grievances are intolerable and will not be endured very much longer. The essential point is to prove to the large mass of peaceable Negroes that there is light at the end of the tunnel. . . . The Negro community must be enabled to believe that the public authorities are their hope and not their enemy."

10. "It is hard to listen to a new voice as it is to listen to an unknown language. . . . Out of fear. . . . The world fears a new experience . . . (as it) doesn't fear a new idea . . . . It is the shifting over from the old psyche to something new, a displacement. And displacements hurt"(Studies in Classic American Literature"- D.H.Lawrence).

Cohen-Penn

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

PEOPLE OF THE STATE OF NEW YORK

-against- 41926/63

SAMUEL FRIEDMAN, ET AL, STIPULATION

Defendants-Appellants.

----------X

It is hereby stipulated and agreed by and between the District Attorney and the attorney for the defendants herein that the time of defendants to serve their brief is extended to and including March 15, 1964, and that these appeals be adjourned to the April calendar.

Frank S. Hogan
per Howard Uhlig

District Attorney

George Schiffer

1 Cohen-Penn

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Frank S. Hogan
per Howard Miller

District Attorney

George Schiffer

Copy

NEW YORK STATE COURT OF APPEALS

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

SARA E. PENN, & ors.,

Appellants.

PLEASE TAKE NOTICE that upon the record on appeal filed herein and presented to the Court, and upon the argument of the appeal, and upon the decision of this Court reported at 16 NY 2nd 581, May 20, 1965, and the remittitur, dated May 20, 1965, and the annexed affidavit of ROBERT KASANOF, a motion will be made to this Court at the Courthouse in the City of Albany on the 20th day of September, 1965, at the opening of court on that day, or as soon thereafter as counsel may be heard: for an order granting reargument so as to permit the Court to consider the contention of the Appellants that their conduct, which formed the basis of their conviction was protected under the FIRST and FOURTEENTH Amendments of the Constitution of the United States and that Section 722 of the Penal Code of the State of New York as applied to them is unconstitutional, ~~or in the alternative~~ and, for an order amending the remittitur herein by including therein or adding thereto a certificate or other statement declaring

that in the determination of this case this Honorable Court was required to and did pass on the foregoing Constitutional questions.

Yours, etc.,

ROBERT KASANOF,
Attorney for Appellants,
Office & P. O. Address,
52 Broadway,
New York City.

TO:

HON. FRANK S. HOGAN,
District Attorney,
New York County.

NEW YORK STATE COURT OF APPEALS

PEOPLE OF THE STATE OF NEW YORK,

Respondents,

-against-

SARA E. PENN, & ors.,

Appellants.

State of New York)
County of New York) ss.:

ROBERT KASANOF, being duly sworn, deposes and says:

I am the attorney who has been engaged by the Appellants in the above-mentioned case to prosecute a petition for certiorari for the Supreme Court of the United States, and this affidavit is made in support of the Appellants' motion to amend the remittitur, or in the alternative to reargue, so that the record in this case clearly reflects that this Court passed upon the Appellants' contention that their conviction under Section 722 of the New York Penal Code was in violation of their Constitutional rights under the FIRST and FOURTEENTH Amendments of the Constitution of the United States.

Such reargument or amendment of the remittitur is necessary in order that the defendants may properly perfect their contentions in seeking review by the Supreme Court of the United States and obtaining from the Supreme Court of the United States a final determination as to whether the conviction affirmed by this Court was in violation of their Constitutional rights.

I have communicated with the office of HON. FRANK S. HOGAN, District Attorney of New York County, counsel for the Respondents, and am authorized by Assistant District Attorney MALVINA GUGGENHEIM to state to this Court that counsel for the Respondents has no objection to an amendment of the remittitur herein.

There can be no serious doubt that the Appellants urged in this Court and in the Appellate Term below that the conviction was in violation of their Constitutional rights under the FIRST and FOURTEENTH Amendments.

Point headings II and III of the Appellants' Brief in this Court contain such an assertion. Point II of the Respondents' Brief answers and treats such an assertion. Both the majority opinion (By Capozzoli, J.) and the dissenting opinion (By Hofstadter, J.) in the Appellate Term treated and decided the issue of the Constitutionality of the convictions under the FIRST and FOURTEENTH Amendments [The Appellate Term opinions are set out as an Appendix in the Respondents' Brief in this Court].

Indeed the headnotes and note of the Official State Reporter at 16 NY 2nd 581, indicate that the Constitutional issue was tendered to this Court and decided by this Court.

If for any reason the Court did not consider and pass upon the Constitutional questions tendered by the Appellants then the Appellants respectfully ask leave to reargue the case so that the Court may pass and consider upon their con-

tention that their conviction is in violation of the FIRST and FOURTEENTH Amendments and that Section 722 of the Penal Code as applied to them is unconstitutional.

WHEREFORE, it is respectfully urged that this Court either grant reargument so as to consider the Constitutional questions proposed by the Appellants, to wit: Whether their conduct, which was the basis of their conviction was protected by the FIRST and FOURTEENTH Amendments of the Constitution of the United States and whether Section 722 of the Penal Code as applied to them is unconstitutional, or in the alternative, amend the remittitur to reflect that the Court did in fact pass upon and reject those contentions, so that the Appellants may properly perfect their contentions in applying to the Supreme Court of the United States for a writ of certiorari.

S/
ROBERT KASANOF

Sworn to before me this
13 day of August, 1965.

Notary Public

SIDNEY SCHREIBERG
NOTARY PUBLIC, STATE OF NEW YORK
No. 31 2849650
Qualified in New York County
Commission Expires March 30, 1966

THE FOLLOWING PAGE(S) ARE THE BEST COPY AVAILABLE.

IN THE

Supreme Court of the United States

October Term, 1965

No. 1041

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

SARA E. PENN, HELENA L. LEVINE, BARBARA PLISKOW, EDWARD M. PITT, BENITA T. CANNON, CLAUDIO RAMOS, THOMAS McKENNA, MERYL CHATKIN, ISIDORE T. BLOOM, DAVID RIVERA, and SAUL GOTTLIEB,

Petitioners.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term, 1965

No. 1041

THE PEOPLE OF THE STATE OF NEW YORK,
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SARA E. PENN, HELENA L. LEVINE, BARBARA PLISKOW, EDWARD M. PITT, BENITA T. CANNON, CLAUDIO RAMOS, THOMAS MCKENNA, MERYL CHATKIN, ISIDORE T. BLOOM, DAVID RIVERA, and SAUL GOTTLIEB,
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Opinions Below

The decision of the New York Court of Appeals, affirming the judgment without opinion, is reported at 16 N. Y. 2d 581. The opinion of the Appellate Term of the New York Supreme Court is reported at 48 Misc. 2d 634.

The Statute Involved

The relevant portions of Section 722 of the Penal Law provide:

> "Disorderly Conduct.
>
> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> * * *
>
> "2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others.
>
> "3. Congregates with others on a public street and refuses to move on when ordered by the police;"

Questions Presented

Whether the First and Fourteenth Amendments of the Constitution of the United States shield from prosecution illegal acts, committed for the purpose of protesting illegal racial discrimination in the building trades.

Whether the United States Constitution prohibits the exclusion from evidence of testimony relating to specific details of discrimination committed by the organization against which the protest was directed.

Statement

The People's Case

The Incident at 10:00 A.M.

Salvatore Kane, a truck driver for the Transit Mix Corporation, testified that on August 1, 1963, he was on route to deliver cement to the S. S. Silverblatt Housing Project located off Rutgers Street in Manhattan (8-10).*

Steering his 35 foot truck left from Rutgers Street onto an access road, he approached the entrance gate of the project at a speed of 15 miles per hour. Two men stationed at the gate "waved on to come in" (197-8) when suddenly a group of people "jumped right in front of me" and sat down before the gate, forcing the driver to make a "quick stop" (10-11, 18, 199). The driver identified those who blocked his way as the petitioners Pitt, Penn, Pliskow and Levine (10-13; also see Exh. 1). The defendants didn't use loud or boisterous language, but were singing. The witness also noticed others picketing with signs near the construction site (23). The driver was told to stay in his truck (32), and he remained there for fifteen or twenty minutes until the obstruction was cleared away (15).

Thomas Coyne, a police sergeant attached to the 7th Precinct was on duty on August 1, 1963 at the Rutgers Street entrance to the construction site, arriving at about 6:00 a.m. that morning (50-1). At about 10:00 a.m. the site was being picketed by about 150 people (52, 70-1). At

* References, unless otherwise indicated, are to the typewritten minutes of trial.

that time, a cement truck approached the gate, and "a cry went up from the pickets area, stop the truck" (51).

> "The next thing I observed was four pickets from the original picketing group go under the police barrier and proceed to sit in the roadway at the entrance to the construction site * * * The truck which was proceeding through the entrance then came to a stop" (52).

The pickets who blocked the roadway were identified as the petitioners Pitt, Penn, Pliskow and Levine (53; also see Exh. 1).

The sergeant talked to an inspector who talked to each defendant individually, receiving no reply (54-5). Then Coyne told each picket that they were violating the law, and asked each to "get up and leave, they were blocking the lawful delivery of concrete to the construction site" (53, 61-4). Three other officers also spoke with the petitioners, but "they all refused to get up and leave" (53, 59). Finally, after being seated in the roadway for about fifteen minutes, the defendants were arrested and walked quietly to the police wagon (56, 66).

During the incident, the number of pedestrians congregating about the scene increased from approximately 100 to 200 (71), reporters, photographers, and a large detail of police also being present (56, 64-5, 71, 74). The vehicles passing on Rutgers Street were slowing down to observe, and a policeman had to be dispatched to expedite the traffic (57).

The Incident at 11:00 A.M.

Paul Orlando, a truck driver, testified that at 11:00 a.m. on August 1, 1963, he was in the vicinity of Rutgers Street delivering concrete to the project site (37-8). As he neared the entrance, several pickets jumped in front of the truck and sat in the roadway, forcing him to halt his truck on an incline (38-9, 42, 46). The witness identified two of the pickets as the defendants Cannon and Rivera (39; also see Exh. 2). Setting the truck's foot brake, hand brake, and trolley brake, Orlando left the cab and gave the police his license (40). He noticed other pickets in the area with signs, as well as photographers and reporters (45). After about a half hour delay, the roadway was cleared and the driver was able to steer his truck onto the construction site (40, 45). On cross-examination, the witness added that he had been to the site earlier at 7:30 a.m., but the pickets were then at the back gate (46).

Salvatore Kane testified that at about 11:00 a.m. he returned to the site with another load of cement (15).

> "I spotted a truck being blocked by pedestrians, so I had no choice, going around him or backing up, so I pulled behind him and then these people got underneath my truck" (16).

Kane recognized the defendant Chatkin as the picket who slid under his truck and sat in front of the left rear wheel (16, 26-9, 201). Since his vehicle was stopped on an upwards incline, the driver remained in the cab with his foot on the brake all the time (35), another truck having arrived and stopped behind him (25-6).

Harold McCauley, a sergeant attached to the 17th Precinct was stationed at the Rutgers Housing site since 6:00 a.m. on August 1. He stated that trucks turning left on Rutgers Street would drive along the access road towards the entrance gate (113, 120, 122) which, although kept closed, would be opened by two men upon the approach of a vehicle (86-7, 111). At about 11:00 a.m. there were 100 to 125 pickets in the area (115), as a truck approached the gate.

> "A number of pickets who were inside the police lines, police barriers, there was a cry from I don't know where, here comes a truck, and at that time a number of pickets overran the police barriers by going under them, and through them, and jumping over the barriers, and into the roadway, and threw themselves in the roadway, sat down, and the truck came to a stop" (87).

The defendant Cannon sat directly in front of the right front wheel of the concrete truck, with the defendant Ramos next to her. Behind them, but in front of the gate, sat the defendants McKenna, Gottlieb and Rivera (88, 90; also see Exh. 2).

Several minutes later, a second cement truck arrived and stopped behind the first one. Two pickets, the defendants Bloom and Chatkin, then sat down in front of its wheels (92-3).

The sergeant with Deputy Inspector Lewis approached each defendant and spoke to them (93). Lewis first addressed the three seated in front of the gate, McKenna, Gottlieb and Rivera. He asked them to get up and walk away, but received no reply (94). Telling them that they

must move, as they were obstructing the roadway and violating the law, he again received no response (95). McCauley told the same three they would have to move, but could resume picketing, again being faced with silence (95). The three were then arrested and walked quietly to the patrol wagon (96).

Lewis and McCauley then confronted Cannon and Ramos, seated directly in front of the first truck. Lewis asked them to "please get up from the roadway, and walk away or resume your picketing, that you are obstructing traffic" (96). McCauley reiterated the request and warned the pickets that they were subject to arrest. Receiving no response, the two defendants were arrested (96-7).

The two officers then addressed Bloom and Chatkin who were blocking the second truck, Bloom being seated in front of the right rear wheel (97). Both policemen asked the defendants to move on.

> "He [Bloom] stated to me [McCauley], if I arrest him he will get up" (98).

The defendants were then arrested (98).

During these events, the original crowd of about 100 to 125 pedestrians grew to about 175 to 225 in number, and gathered about the sidewalk and roadway looking on (98-9, 115). Vehicular traffic of about medium density was routed around the trucks by other policemen (99-100).

The Defense

Madison Jones, executive director of the City Commission of Human Rights (142), **Donald Shaughnessy**, a professor at Columbia University and a member of the

faculty of the Institute of Labor Management Relations at Rutgers University (164-5), and **Shirley Siegal**, an assistant attorney general in charge of the Civil Rights Bureau (168-9), each testified that they were familiar with allegations of discrimination in the building construction industry and with results of investigations into the charges (Jones 142-3, 147; Shaughnessy 165; Siegal 170-1). However, tesimony "with reference to any findings that they may have made as a result of studies" was not admitted into evidence by the court (209).

Harold Klorfine, a secretary of the New York City Housing Authority, a public corporation in charge of the Rutgers Housing site (153), testified that the project was bounded by Pike Street on the west, Rutgers Street on the east, Madison Street on the north, and Cherry Street on the south (156). An access road, formerly known as Monroe Street, runs through the project grounds connecting Rutgers and Pike Streets, each approachway having its own entrance gate. The boundary line appears to extend about two feet in front of the Rutgers Street gate to the project (157-60). The witness added that among the unions represented in the construction of the housing project were bricklayers, masons, lathers, carpenters, steamfitters, electricians, plumbers and sheet metal mechanics (162-4).

Helena Louis Levine, an instructor at New York University and doctoral candidate, testified in her own defense (172-3).

She related that after hearing about the picketing through various organizations and individuals, she de-

cided to join the protest at the housing project (178). Early in the morning of August 1, she had sat in front of the Pike Street entrance to the project for about 10 or 15 minutes, but the police rerouted trucks and didn't arrest her (188-9). A while later the pickets decided to block both entrances to the project, one half of them picketing each gate (189). At about 10:00 a.m., "somebody said, here comes a truck" (181), and as "part of a plan" (180), the "logical point" arrived to continue the protest by "prevent(ing) the truck from entering" (181-2). The witness, however, explained that the "plan" did not specify who would block the truck, but that "those who wished to continue their protest could do so * * * when the truck came" (179-82).

The defendant then sat in front of the truck, and although asked twice by two policemen to "move on," she didn't answer and didn't move (184-5).

The witness stated the reason for the protest:

> "I intended to bring it to the attention of the authorities there was discrimination being practiced in the building trades unions, which was against the law, in violation of the law" (175).

It was stipulated by the parties that if the other defendants were to testify "they would testify that on August 1, 1963, they sat down at the places approximately testified to by People's witnesses for the purposes and with the intent stated by Mrs. Levine, to be her purpose and intent" (192-6).

The Judgment

On October 2, 1963, judgment was entered in the Criminal Court of the City of New York, County of New York, convicting the petitioners of the offense of Disorderly Conduct (Penal Law §722, subdivisions 2 and 3), and sentencing each defendant to pay a fine of $25.00 or, in default thereof, to serve five days in jail (Mins. of Sent. 7). On October 15, 1964, the Appellate Term of the Supreme Court, First Department, affirmed the conviction, one Justice dissenting, and subsequently, the case was affirmed unanimously by the New York Court of Appeals.

Summary of Argument

The instant appeal arises from one of a growing number of incidents of disorder connected with racial protest. The present case concerns the deliberate interference with trucks delivering construction supplies to the Rutgers Housing site. Separated by an interval of one hour, the petitioners in two groups darted into the path of trucks and sat immobile in front of the wheels. Ingoring the pleas of police to move out of the way and return to the picket line, the petitioners effectively obstructed the vehicles, until police were compelled to arrest them. Clearly, this behavior constituted the offense of disorderly conduct.

Nonetheless, the petitioners here contend they were guiltless, first, because their actions were designed to call attention to criminal racial policies of the construction unions, and second, because it was constitutionally protected "free speech." They are mistaken on both scores.

Regardless of how laudable and public-spirited their purposes, the defendants' conduct was inappropriate and unnecessary to these ends. A similar disproportion mars their constitutional argument. The petition for redress may not be exercised in a manner unnecessarily disruptive to public order.

POINT I

Section 722 of the New York Penal Law as applied does not infringe upon the rights of petitioners under the First and Fourteenth Amendments of the United States Constitution.

Not content with protesting alleged racial discrimination in the building trades unions by peaceful picketing, the defendants, part of a group of about 150 demonstrators, deliberately overran police boundary markers for the manifest purpose of obstruction and disturbance of the public peace. Having failed to halt the entrance of trucks into a construction project, known as the Rutgers Housing site, by blocking one of the two gates, the pickets redeployed to cover both entrances to the grounds. At 10:00 a.m. the arrival of a huge cement truck presented "obviously the logical point" to impede the progress of construction. "A cry went up from the pickets, stop the truck" (51), and four defendants, breaking ranks, jumped into the roadway and sat down, abruptly halting the driver who obviously could not roll his huge van over immobile human beings. After 10 or 15 minutes of fruitlessly imploring each defendant to move, their entreaties and explanations of the law being met by silence, the police

arrested the defendants. At 11:00 a.m., apparently undeterred by earlier events, seven other demonstrators by the same method succeeded in blocking the entrance to the site of two more cement delivery trucks, this time for about half an hour. Similar police pleas to resume picketing on the sidewalk, were tersely answered by a defendant, indicating that he would "get up" if arrested. During both these incidents, the crowd of onlookers appreciably increased in size, the access road was completely clogged, no delivery trucks being able to enter the gate, and traffic on Rutgers Street was slowed, a policeman being sent to expedite its flow.

Thus, by their actions, the defendants have produced a virtually classic case of disorderly conduct. The demonstrators not only effectively obstructed and interfered with others (the truck drivers), but congregated on a public street and refused to move on when ordered to do so by police. Moreover, their dramatic action and conflict with police and truckers threatened a more serious breach of the peace.

This Court has held public expression of social grievances within the constitutional protection of the First Amendment. However, it is equally clear that protest by demonstration does not stand on the same constitutional footing as verbal expression.

> "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure

> speech * * * We reaffirm the statement of the Court in Giboney v. Empire Storage & Ice Co., supra, 336 U. S. at 502, that 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.' " [*Cox* v. *Louisiana,* 379 U. S. 559 (1965)].

Accordingly, protest which takes the form of conduct is subject to reasonable regulation and control in the interest of public safety and order [see *Martin* v. *Struthers,* 319 U. S. 141, 143, 147 (1943); *Whitney* v. *California,* 274 U. S. 357, 373 (1927) (concurring opinion)].

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection." [*Cox* v. *New Hampshire,* 312 U. S. 569, 574 (1940); also see, *Lovell* v. *Griffin,* 303 U. S. 444, 451 (1937); *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496, 515-16 (1938); *Schneider* v. *State,* 308 U. S. 147, 160 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296, 306-7 (1940); *Giboney* v.

Empire Storage & Ice Co., 336 U. S. 490 (1949); *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953); *People* v. *Peck*, 7 N. Y. 2d 76 (1959); *People* v. *Ward*, 159 Misc. 328 (App. Pt. 2d Dept. 1936), aff'd 272 N. Y. 615 (1936); *People* v. *Stover*, 12 N. Y. 2d 462 (1963); *People* v. *Martin*, 43 Misc. 2d 355 (App. Term, 2d Dept. 1964), aff'd 15 N. Y. 2d 933 (1965), cert. den. 382 U. S. 828 (1965)].

While the petitioners apparently do not question the right of the state reasonably to restrict the exercise of speech, they maintain that their instant actions, designed to call the attention of the authorities to a violation of the law, i.e., discrimination practiced by the building trades unions, are thereby constitutionally protected. However, the element overlooked by this argument is that, although the motives of the pickets may have been commendable, the means chosen to dramatize their protest were neither meritorious nor peaceful.

Indeed, there is not even a reasonable relationship between the means adopted and the intent to procure rapid remedial measures for their grievances. No amount of sitting-down could here result in an immediate end to segregation practices in the unions, or to the immediate arrests of violators. Besides, if the demonstration was intended to call official attention to a violation of the law, then the mission of the picketers was accomplished when the police initially observed them lawfully picketing. Unlawful behavior is surely unnecessary to attract a police officer's attention. Moreover, the demonstrators elected to sit, not until the police became aware of their claim, but until they were arrested. If getting arrested, with its

attendant publicity, was what they intended, then the defendants pose another paradox: seeking arrest and by the same token deeming the arrest unlawful. This logical absurdity additionally suggests the falsity of petitioners' thesis.

Indeed, the unreasonableness of the sit-down method is clear from the evidence of free opportunity to peacefully bring their protest to the attention of the authorities. They had been picketing the construction site for many days, including the day in question, and were permitted to display their signs and sing their songs without interference. It was only when the pickets chose to dramatize the protest by interfering with the rights of others that they invoked the censure of the law. Even after the petitioners had first sat down, they were still offered the opportunity to rejoin the pickets behind the police barriers (95-6), if they only got up from the roadway. The police thus in no way attempted unreasonably to curtail the airing of anti-segregation sentiment, objecting only to the disruptive manner of the protest. Evidently, then, the real purpose of the sit-downs was not simply to call attention to discrimination, for this was accomplished by picketing within the police barriers, but, by bold interference with trucks on a city street and defiant courting of their own arrest, to obtain the publicity which invariably accompanies acts of public disruption. Such a posture does not commend itself to constitutional protection.

> "A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did

not agree to listen to their exhortations." [*Cox* v. *Louisiana,* 379 U. S. 559 (1965).]

* * *

"One would not be justified in ignoring the familiar red light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions" [*Cox* v. *New Hampshire,* 312 U. S. 569, 574 (1940)].

* * *

"[A] person could not exercise this liberty [freedom of speech] by taking his stand in the middle of a crowded street, contrary to traffic regulations and maintain his position to the stoppage of all traffic * * *" [*Schneider* v. *State,* 308 U. S. 147, 160 (1939)].

Furthermore, the attempt to introduce testimony and investigative reports substantiating charges of discrimination in the building trades unions was properly defeated by the trial court. For, if the defendants sought to establish a reasonable and good faith foundation for their allegations, it was sufficient to allow the defense witnesses to testify that they were familiar with the charges, as well as with reports of investigations into those charges. Indeed, discrimination in building trades unions was "of so long duration and so widely known that the courts might, if they so elected, take judicial notice of the fact" [*Gaynor* v. *Rockefeller,* 21 App. Div. 2d 92, 100 (1st Dept. 1964)]. Thus establishing that the protest was not speciously and maliciously grounded, proof of its truth was irrelevant to a defense of "fair comment" [see, *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 279-83 (1964)].

Finally, while the petition repeatedly attacks the New York authorities for "making no effort" to enforce anti-discrimination measures, the police and district attorney, according to the petition, preferring to enforce the disorderly conduct laws instead, it should be noticed that at least in New York County members of the building trades unions have been prosecuted for practicing segregation [see *People* v. *McLinskey,* Ind. No. 4456/1964, ruled incompetent to stand trial, April 20, 1965; *People* v. *Schurkman,* Ind. No. 4457/1964, convicted, April 28, 1965].

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
ALAN F. LEIBOWITZ
Assistant District Attorneys
Of Counsel

March, 1966

[N.O]

The Facts

The events occurred in ritualistic fashion - like a play in which all of the participants knew their parts and followed their scripts without deviation.

The place at which all the action occurred was an access road to the Rutgers Street housing project, a City Housing project, on the Lower East Side. The road was closed to traffic at both ends. Traffic on Rutgers Street, the main roadway, flowed freely throughout the entire period in question.

The dramatis personae included 40 patrolmen, 4 sergeants, 1 police captain, a duty inspector and a chief inspector from the New York City Police Department, members of the local press, a large number of pickets, a large number of onlookers, 2 truck drivers (Salvatore Kane and Peter Orlando) and the defendants-appellants.

The defendants included among their number 3 Ph.D.s a Ph.D. candidate, a college instructor, a former college instructor, a writer, a junior high school teacher, and 4 social workers with college degrees or who are about to receive college degrees.

The drama was in two acts, as follows:

The first act involved defendants Pitt, Penn, Pliskow and Lavine, truck driver Kane, various representatives of the police force and members of the local press.

As Kane approached the closed gate of the housing

project he was stopped by defendants Pitt, Penn, Pliskow and Levine. There was no concerted action amongst the defendants; each independently sat down in the roadway in front of the entrance to the project. Kane did not ask the defendants why they were there or what they wanted. Indeed, he was given no opportunity to do so, since the police immediately took charge. Kane was immediately told by a ranking police officer to come down from his cab to listen to the ensuing dialogue between the defendants and various members of the police department.

The principal spokesman for the Police Department on this occasion was Sergeant Thomas Coyne. Coyne never asked the defendants the purpose of the project. He merely told them that they were blocking the delivery of concrete and that they were to move. When they failed to move they were placed under arrest. As soon as they were put under arrest they got up and walked in a peaceful and orderly manner to the patrol wagon.

Throughout this scene photographers and newspaper reporters were given an opportunity to interview the defendants and take pictures.

[This scene delayed the delivery of concrete by 20 minutes, approximately 15 minutes of which was attributable to the fact that the defendants were photographed and interviewed. Sergeant Coyne surmised that a photographer who took one of the pictures was standing in the roadway. To Coyne's knowledge none of the patrolmen asked photographers, newsmen or television cameramen to get out of the roadway.]

[Although Kane knew there was another entrance to the project, he made no effort to back his truck up and use the other entrance.]

The second act was in three scenes. It involved the remaining defendants, truck drivers Kane and Orlando, various representatives of the police force and members of the local press.

The first scene involved Orlando and defendants Ramos and Cannon. (Although Orlando identified Ramos as defendant Rivera, it is conceded that his testimony in fact related to defendant Ramos). As Orlando approached the closed gate of the housing project he was stopped by defendants Ramos and Cannon. These defendants did not act in concert. First

in the roadway in the roadway
Ramos sat down, then afterward Cannon sat down. Orlando did not ask the defendants why they were there or what they wanted. Once again the police took charge - they promptly asked Orlando for his driver's license. Sergeant McAuley told the defendants to move and when they failed to do so they were placed under arrest. They were told to walk to the patrol wagon, which they did in a peaceful manner. Neither uttered any boisterous or profane language and neither in any way became abusive or insulting or acted in a violent way.

The second scene involved defendants McKenna, Gottlieb and Rivera. These defendants were sitting in front of the gate at the housing project at the time Orlando was stopped by defendants Ramos and Cannon. McKenna, Gottlieb & Rivera
These Defendants had no contact with anyone other than members of the Police Department. They were told by Sergeant McAuley to move from in front of the gate. When they refused they were placed under arrest and were told to walk to the patrol wagon, which they did. None uttered any boisterous or profane language or in any way became abusive or insulting, nor did any act in any violent manner.

The third scene involved defendants Chatkin and Bloom and truck driver Kane. Kane pulled up behind a stopped truck. Defendants Chatkin and Bloom sat down underneath the truck. Since there was another truck blocking his path, even if defendants had not gotten underneath the truck Kane could not have advanced. Kane did not ~~ask~~ speak to any of the defendants; he did not ask them to move nor did he ask them why they were sitting where they were. Sergeant McAuley once again took charge, asked the defendants to move, and when they refused placed them under arrest. At his request they got up and walked peacefully to the patrol wagon without uttering any boisterous or profane language, becoming abusive or acting in any violent way.

Throughout this entire period, members of the press were allowed to roam freely to take pictures of and interview the defendants.

THE ISSUES

Two principal issues are presented:

(1) Whether a peaceful demonstration with the intention of calling to the attention of the public authorities the commission of a crime can constitute disorderly conduct when there is no evidence of violence, public disturbance or likelihood of either.

(2) If such a demonstration, even if it violates local law, is protected by the First Amendment to the Constitution of the United States.

The Statute

The relevant portions of Section 722 of the Penal Law, ~~The statutes~~ upon which the complaints were based, is as follows:

"Disorderly conduct

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

* * *

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others.

"3. Congregates with others on a public street and refuses to move on when ordered by the police;"

The Complaints

These prosecutions arose out of demonstrations by eleven unrelated individuals who attempted to call to the attention of the police and the public that there was discriminatory hiring on the Rutgers Street city housing project on the lower east side of Manhattan in violation of Section 220(e) of the Labor Law and that the building trades unions engaged in constructing the project discriminated against Negroes and Puerto Ricans in violation of Sections 41 and 43 of the New York Civil Rights Law and Section 343-8.0 of the New York City Administrative Code.

The complaints in each case allege that the defendant on August 1, 1963, at the Rutgers Street City housing project placed himself or herself in a sitting position in the roadway obstructing the free passage of vehicular traffic and boisterous langu

refused, after being a

the roadway.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

Statement

This is an appeal by defendants from a conviction on September 26, 1963 by the Criminal Court of the City of New York, County of New York, Samuel J. Ohringer, J., presiding, for violations of subdivisions 2 and 3 of Section 722 of the Penal Law.

There is no opinion of the Court below.

POINT IV

THE TRIAL COURT'S REFUSAL TO ADMIT RELEVANT EVIDENCE WAS PREJUDICIAL TO DEFENDANTS

The Trial Court refused to admit evidence as to the existence of violations of sections 41 and 43 of the New York Civil Rights Law and section 843-8.0 of the Administrative Code of the City of New York at the Rutgers Street project at the time of the events in question. It refused to admit evidence with respect to Kane's knowledge of the existence of the crime. It refused to admit evidence as to the knowledge of the police as to the existence of the crime. It refused to admit evidence with respect to whether the police were doing anything about the crime being committed on the job site.

The determination as to whether particular conduct is likely to result in a breach of the peace and whether such conduct is protected by the First Amendment to the Constitution of the United States must be made in light of all the facts and circumstances. When a crime is being committed it is the right, indeed the obligation, of members of the public to call attention to the existence

of the crime to the public authorities.

The existence of the commission of the crime at the job site, knowledge of Kane and the police of the crime, and whether or not the police were doing anything about it were relevant factors in determining whether the actions of the defendants were improper under the circumstances.

Point I

The evidence in the court below was insufficient to support the convictions.

(A) **The defendants' acts were not done with the intent to provoke a breach of the peace or under circumstances whereby a breach of the peace may have been occasioned.**

A violation of Section 722 involves action either (a) "with intent to provoke a breach of the peace," or (b) under circumstances "whereby a breach of the peace may be occasioned."

As stated by this court in People v. Donegan, 19 Misc.2d 541 (Sp. Sess. App. Part 1st Dept. 1959) at p.543:

> "To constitute disorderly conduct, there must be proof not only that (1) the defendant committed the acts charged, but also that (2) they were committed with intent to provoke a breach of the peace or under circumstances likely to cause a breach of the peace. Each case must depend upon the time, place and circumstances of the act. (People v. Perry, 265 N.Y. 362, 364.) 'The act complained of must at least be one which reasonably does tend to a breach of the peace'. (People v. Nixon, 248 N.Y. 182, 186.)"

The term "breach of the peace" was defined by the Court of Appeals in People v. Most, 171 N.Y. 423 (1902) as follows (at p. 429):

> "A breach of the peace is an offense well known to the common law. It is a disturbance of the public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community."

It is clear in the instant case that the defendants did not intend to provoke a breach of the peace and the circumstances were not such as to raise a likelihood that a breach of the peace may have been occasioned.

(1) The defendants acted in a peaceful manner at all times.

There is no evidence to support the allegations in the complaint that the defendants used loud and tortious language.

The respondent called four witnesses. Truck driver Kane testified that he did not hear any of the defendants use loud and boisterous language. Sergeant Coyne testified that he did not hear any of the defendants use profanity; he did not see any of the defendants engage in any act of physical violence; and he did not see any of the defendants threaten anyone with physical violence. Truck driver Orlando testified that he did not hear any of the defendants use any loud or boisterous language or any profanity or threaten anybody with violence or attempt to assault or be violent with anybody.

Sergeant McAuley testified that he did not hear any defendant utter boisterous or profane language or become in any way insultory or abusive; he did not see any defendant act in any violent manner; or become in any way abusive or insulting or threaten anyone with violence.

Upon being placed under arrest, each of the defendants acted in accordance with instructions of the police, got up, and walked peaceably to the patrol wagons. There was no violence, uproar or disturbance.

(2) The presence of large numbers of police made a breach of the peace unlikely.

Sergeant McAuley testified that 40 patrolmen, 4 sergeants, 1 police captain, a duty inspector and a chief inspector were assigned to the site. As the court recognized in People v. De Stefanis, 34 N.Y.S.2d 52 (Co. Ct. Utica, 1942) the defendant was watching some of the father's tools on private property and refused to leave until arrested. On dismissing the charge, the court noted that a breach of the peace is unlikely when there are police officers present. It stated as follows (at p. 54):

> "the presence of the police officers prevented any breach of the peace, because it is to be expected that the officers will not themselves breach the peace.
>
> * * *
>
> "Since there was no actual breach of the peace and since the presence of the police made such a breach of the peace extremely remote if not impossible, an essential element of the charge of disorderly conduct is missing."

(A) The entire demonstration was ritual performance with no likelihood of a breach of the peace.

Four groups of arrests are here in issue. In each the facts were the same. Five steps were involved in each instance: sitting down, being asked to move, arrest, peaceful compliance with directions of police officers and photographs and interviews with members of the press. Each instance involved ritual behavior. Everyone, the defendants, the police and the press, was familiar with the script. There was no scene in the drama for violence and everyone was well-aware of it. Clearly these were not circumstances under which a breach of the peace "may have been occasioned" as required by the statute.

(B) <u>There was no obstruction of vehicular traffic within the meaning of Section 722.2</u>.

Each of the police who testified stated that traffic was flowing freely on the main thoroughfare throughout the occurrence of the incident in question. Kane and Orlando were delayed however in delivering cement. . The delay was not due to obstruction by the defendants. It was due to

an attempt to communicate to them. The attempt was blocked by the police. The delay was caused primarily by the member of the press whom the police made no attempt to restrict. The record, however, shows nothing more than the fact that they were stopped. This is insufficient to support a conviction under section 722.2. If it were, a person who stopped a truck on a highway to warn that a bridge was out further up the road could be convicted under this section. Both the objective for which the truck is stopped and the manner in which it is stopped are relative in determining whether an offense has been committed. If the truck in the preceding example were stoped by strewing nails on the highway, an offense under section 722.2 might be committed. Under such circumstances the irate truck driver might have descended from his cab and breached the peace before the laudable purpose of saving him from probable distruction could be disclosed. Similarly, a breach of the peace might be occasioned if a person stopped a line of cars on a highway in a peaceable manner but for no reason whatsoever.

Thus the circumstances of the stopping and the intention for the stopping, and not the mere stopping itself,

are the factors which determine whether or not an offense has been committed. These circumstances are crucial in determining not only whether there is the requisite public annoyance, but also whether a breach of the peace is likely to be occasioned by the action.

In the instant cases the circumstances of the stopping clearly could not cause a breach of the peace - the action was peaceful and the police were at all times in complete control. Similarly the purpose for the stopping was not one that was likely to cause a breach of the peace. It was to inform that a crime was being committed. It was an act of communication - not an act of obstruction. At no time did the defendants have an opportunity to inform Kane and Orlando what they were doing. They had no opportunity to speak to either of them since the police took over immediately. If they had had an opportunity to speak to them several things may have occurred. Kane and Orlando may have agreed with the objectives of the defendants and decided not to deliver cement; clearly no breach of the peace would have been occasioned under such circumstances. The drivers may have told the defendants that they did not care about the existence of the crime and wished to deliver the cement anyway.

At that point, after having made their complaint known to the persons they stopped, the defendants may have removed themselves from the roadway and allowed the trucks to enter. Under these circumstances there would have been no breach of the peace. Finally, the defendants may have refused to move even after the drivers indicated that they were not interested in the existence of the crime and wanted to deliver the cement. Even in this instance it was highly unlikely that a breach of the peace would have been occasioned since the drivers would undoubtedly have turned to some of the many police on hand rather than cause a breach of the peace.

In the instant case, however, there is no testimony that either Kane or Orlando considered themselves annoyed, disturbed or in any way inconvenienced by defendants' acts. The only ones who appear to have been disturbed were the police and it is clear that disturbing the police is not a basis for sustaining a conviction under section 722.2. People v. LaLister, 9 Misc.2d 518 (Sp.Less App.Patd 1st Dept. 1958).

The language of the Court of Appeals in People v. Carcel, 3 N.Y.2d 327 (1957) in which convictions under section 722.2 for peaceful picketing in front of the United Nations were reversed, is particularly opposite here:

> "* * * There is absolutely no showing here that defendants caused any serious annoyance to pedestrians or that their manner was threatening or abusive. Indeed, the only evidence upon which the conviction might be predicated was the arresting officer's simple statement that the defendants 'were blocking the pedestrians' right of way'. That evidence we hold to be insufficient."

(C) There was no "congregations with others" within the meaning of Section 722.3.

The crucial phrase under section 722.3 is "congregating with others." This phrase was considered by the Court of Appeals in People v. Carcel, supra. The court stated (p. 333):

> "* * * But before the refusal to heed a policeman's warning can serve as the basis for a conviction under subdivision 3, it must be shown that defendants were 'congregating with others' at the time the order was refused. That is not the case here. The term 'congregating' implies and is usually applicable to the coming together of a considerable number of persons (Powell v. State, 62 Ind. 531), or a crowd (Webster's New Collegiate Dictionary; The Oxford Dictionary [1923] and a crowd has been defined as a throng, multitude or great number of persons (People v. Phillips, 245 N.Y. 401, 402). The term 'congregates with others', as used in the statute, requires at the very least three persons assembling at a given time and place (People v. Lo Vecchio, 185 Misc. 197, 201, supra). It would be an unjustifiably liberal interpretation of subdivision 3 and at variance with the strict construction called for in these cases to hold that the defendants here, only two in number and as appears from the record not even

standing together, were 'congregating with others'. Investigation of the cases decided under this provision fails to reveal any contrary holding. In the cases upholding convictions there was either a large group (People v. Bogin, 248 N.Y. 530); a group of friends (People v. Galpern, supra); a number of persons (People v. Hipple, supra); or a crowd (People v. Friedman, 6 Misc.2d 277; People v. Hussock, supra; People v. Garvey, 6 Misc.2d 266)."

In the instant case there was no congregating. There is no evidence of concerted action. Individuals merely sat down at different places and different times in the roadway. Such action does not come within the prohibition of section 222.3.

Point III.

The conduct for which the convictions were obtained is protected by the First and Fourteenth Amendments to the Constitution of the United States.

The Supreme Court of the United States has held that such protests, including "sit-ins" and "sit-downs", in protest against discrimination, are protected by the Constitution of the United States as in the exercise of free speech, the right of public assembly, to [sic] right to petition for redress of grievances and the right to equal protection of the laws. Edwards v. South Carolina, 83 S.Ct. 680 (1963); Shuttlesworth v. Birmingham, 83 S.Ct. 1130 (1963); Peterson v. Greenville, 83 S.Ct. 1119 (1963); Johnson v. Virginia, 83 S.Ct. 1053 (1963).

In Edwards, supra, the defendants had been convicted of breaching the peace when they gathered on the South Carolina State House grounds to protest discrimination against negroes and refused to disperse when ordered to do so by the police. The North Carolina courts had expressly found that the demonstrations had created an actual interference with traffic. The Supreme Court nevertheless concluded that "under the circumstances" the convictions infringed the

constitutional rights of free speech, free assembly and freedom to petition for redress of grievances.

The limits of the constitutional rights of free speech, assembly and the freedom to petition for a redress of grievances are not clearly defined. It is clear that these rights may be exercised by staging sit-down demonstrations. It is equally clear that at some point the exercise of these rights might interfere with other rights requiring protection. All of the circumstances must be taken into account. It is submitted that actions taken under the circumstances of this case were full well within the protection of the Constitution. The action occurred at a city housing project; the street on which it occurred was closed to traffic; the demonstrations were completely peaceful: they were attempting to call attention to the fact that a crime was being committed; the public authorities took no action to investigate or punish the crime being committed; and no one was interferred with except the police. Under the circumstances the arrest of the defendants before they had an opportunity to make their views known to Kane and Orlando was an interference with their constitutionally protected rights of free speech, free assembly and freedom to petition for redress of grievances.

POINT III

Section 722 of the Penal Law should not be so construed as to justify convictions whenever persons are arrested.

There has been a tendency on the part of the police to rely upon Section 722 whenever arrests are made, even though other sections of the law were designed to copy with the particular acts for which the arrests are made. Such is the case here. Defendants might have been charged with violations of Section 83 of the New York City Traffic Regulations or with violations of Section 1102 of the Vehicle and Traffic Law. These violations would have been characterized on the records of these defendants as traffic infractions. The persons involved in these proceedings are public spirited citizens. Convictions for violations of the Penal Law might well have adverse implications on their future careers which would stem beyond the implications from mere convictions for traffic infractions. The courts have repeatedly refused to allow the disorderly conduct provisions to be used as a catch-all. In People v. Balris, 183 N.Y.S. 2d 744 (Otsego Co.Ct. 1958) the court recognized that the defendants may have been guilty of other crimes, but refused to convict for disorderly conduct where the defendants spit beer and expectorated on a car in a public lot. Similarly, the

court refused to convict for disorderly conduct in People v. Zwald, 73 N.Y.S. 2d 399 (Co.Ct. Utica 1947) where the defendant taxi driver refused to leave a private railroad station when ordered to do so. The court in the Zwald case stated as follows:

> "There is an increasing tendency to employ section 722 whenever it is determined a person should be arrested. This shouldnnot be contenanced by the courts. The term 'breach of the peace' was a term well known to the common law. It signified the disturbance of the public peace and tranquillity by any act or conduct inciting to violence to tending to provoke or incite others to breach the peace. As was stated in People ex rel Conley v. Frank, supra [245 App.Div. 777, 281 N.Y.S. 159], it is a 'disturbance of public order by an act of violence, or by an act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.'"

October 8, 1963

Hon. Abraham N. Geller
Justice of the Supreme Court
of the State of New York
100 Centre Street
New York, N.Y.

Re: Daniels v. Rhh N. Tann et al.

Dear Judge Geller:

Please forgive our writing a letter to you in connection with the above matter. However, Assistant District Attorney Nathaniel Kan's supplementary affidavit of October 7, 1963, submitted in opposition to defendants' application for certificate of reasonable doubt in the above-entitled action compels a brief reply. A copy of this letter will be simultaneously delivered to Mr. Kan's office.

Mr. Kan reports that a large number of defendants have been convicted of disorderly conduct and other crimes in this late July 1963 in the protest-against-discrimination demonstrations (Supplementary Affidavit, Paragraph 4). He does not, however, (even in the absence of a full record) controvert the principal point made in the moving affidavit, i.e. that this is a unique case, since it does not involve (as did many of the previous cases in which Mr. Kan concedes certificates of reasonable doubt were granted) any unpeaceful or possibly unpeaceful act by any defendant, or by any number of the onlooking public.

The point is that this case raises the legal question, more purely than any previous case, as to what is meant by conduct intended to breach the peace or whereby a breach of peace may be occasioned. Petitioners [illegible] on behalf of the State that the traffic on Rutgers Street kept moving and was not obstructed, that no unpeaceful act was committed or threatened by any defendants and that there was not one act of disturbance, belligerency, loudness, violence, boisterousness or any threat thereof, committed by any defendant or any number of the public at the scene, even while he [illegible] of peace, or a threatened breach of peace. At the least, the

Hon. Stephen S. Geller

October 2, 1963

question is worthy of consideration; and the case in which the question is raised in your form, along with legitimate constitutional questions, should be entitled to the benefit of a certificate of reasonable doubt already granted in so many less unique cases.

Finally, with respect to paragraph 12 of said supplementary affidavit, Your Honor should be advised that the $50 bail posted in behalf of defendants Hayes and Rivera was attained by a civil rights organization and will have to be returned to that organization. It is not accurate to suggest, as Mr. Zuh does, that defendants Hayes and Rivera in fact have money available, when they have told us they do not.

Respectfully,

Howard M. Squadron

HMS:fb

cc: Assistant District Attorney Zuh

By Hand

Law Offices

SQUADRON, ALTER & WEINRIB

STEPHEN WEINRIB
DAVID ALTER
HOWARD M. SQUADRON

LAWRENCE H. ROGOVIN
DIRK S. GOULD

EDWARD C. WEINRIB
COUNSEL

RECEIVED
OCT 17 1963
VLADECK & ELIAS

32 East 57th Street, New York 22

PLAZA 2-6550

October 15, 1963

Carl Rachlin, Esq.
280 Broadway
New York, N.Y.

Re: State of New York v. Penn, et al.

Dear Carl:

We enclose full set of papers in connection with the application for certificate of reasonable doubt in the above matter, including Judge Geller's learned opinion. We also enclose copy of our notice of appeal which was served and filed on Friday, October 11th. Please advise whether we should have the record typed.

Sincerely,

Howard

Howard M. Squadron

HMS:dlb
Encs.
cc: George Schiffer, Esq.

Law Offices

SQUADRON, ALTER & WEINRIB

STEPHEN WEINRIB
DAVID ALTER
HOWARD M. SQUADRON

LAWRENCE H. ROGOVIN
DIRK S. GOULD

EDWARD C. WEINRIB
COUNSEL

32 East 57th Street, New York 22

PLAZA 2-6550

RECEIVED
DEC 13 1963
VLADECK & ELIAS

December 13, 1963

Carl Rachlin, Esq.
Vladeck & Elias, Esqs.
280 Broadway
New York, N.Y.

Re: People v. Sara Penn, et al.

Dear Carl:

We enclose transcript of the trial in the above matter together with the bills of the two court reporters who provided the minutes. Please be kind enough to read the transcript at your earliest convenience and then return it as I believe we may need all copies for the Appellate Term.

I assume that you will see that the bills are taken care of.

Sincerely,

Howard M. Squadron

HMS:dlb
Enc.
By Hand

Law Offices

SQUADRON, ALTER & WEINRIB

STEPHEN WEINRIB
DAVID ALTER
HOWARD M. SQUADRON

LAWRENCE H. ROGOVIN
DIRK S. GOULD

EDWARD C. WEINRIB
COUNSEL

22 East 57th Street, New York 22

PLAZA 2-6550

RECEIVED
JAN - 2 1964
VLADECK & ELIAS

December 31, 1963

Carl Rachlin, Esq.
280 Broadway
New York, N.Y.

Re: People v. Penn, et al.

Dear Carl:

The Court reporters who prepared the transcript of the record in the above case have been besieging us for payment. We receive an average of two calls a day, and I would much appreciate it if you would see that their bills are paid.

Sincerely,

Howard

Howard M. Squadron

HMS:dlb

MR. RACHLIN:

We could label this file "State v Penn", " N.Y. v Penn", "People v Penn", as it is "People of the State of NY v Penn" and is referred to in various ways.

For simplicity in filing I think it should be labeled "Penn adv. State of NY" and filed in a CORE section. You may want to file it under "P" now but I have seen so many other files referring to CORE in different sections -- Alabama v Soandso, Louisiana, etc. It would be so much easier to find them all if you had a CORE section, all such cases together, and filed according to client's name.

Mrs. Vladeck asked for suggestions and I have come to the conclusion that there should be a separate section for all the "large" matters, with a GENERAL (clients) alphabetical section left over for the individual matters. The unions should be classified by category of occupation or trade with subdivisions of districts and locals and lodges. I am not familiar with the structure of all the unions so am not ready to make an outline of their files, but CORE is simpler relatively and we could make a start on that, if JPV considers this a good idea.

MB - 10/18/63

MEMORANDUM

TO: Ed Lewinson and Louis Smith January 15, 1964

FROM: Gordon R. Carey

Re: Proportioning of Convention Votes

The first meeting of this Committee which was appointed by Chairman McKissick at the NAC in Los Angeles was held on January 4, at the home of Robert Curvin in Newark. The Committee was charged with dealing with the problem of proportioning convention votes among the CORE chapters, and we were instructed specifically to deal with the problems of large metropolitan areas and related topics. At the first meeting were present Robert Curvin, Carl Rachlin and Gordon Carey.

The next meeting of the Committee is to be held at the law office of Vladek and Elias (Rachlin's office), 280 Broadway, New York City, at 10 A.M. on Saturday, January 25.

Those members of the Committee present came up with a number of suggested changes in voting procedure, which will be discussed below, along with some of the rationale for making the changes. It should be pointed out that most of the suggestions are contingent upon acceptance of the first recommendation, which is to reduce the number of votes per chapter to three.

It was unanimously recommended that the number of votes per chapter at the Convention be reduced to three, with one person able to carry two votes. If two representatives of a chapter are present, then one would carry two votes and the other one, and if there are three persons present each would cast one vote. The primary reason for this change is to insure that the National Convention of CORE shall remain a viable, working body which can engage in meaningful debate and discussion. With the growth of the organization, an undue number of delegates voting on the floor would tend to produce a convention in which discussion is not possible. It was the feeling of the Committee that three delegates could well represent the views of any chapter and would still encourage sufficient numbers of persons to attend.

Furthermore, since under the present set-up two persons can carry the entire vote of a chapter, it will be noted that two persons are still required to cast the total vote of the chapter under the suggested change. Therefore, we are not encouraging a great reduction in the number of delegates. Likewise, by reducing the representation across the board, no inequity is worked upon any idividual chapter. This change would also simplify the voting procedure. At the present time, it is required that we count three separate kinds of votes on the convention floor. Under the new system we would only have to count two different kinds of votes.

The second suggestion deals with college chapters. There are two alternatives which we have not yet been able to resolve. The first alternative is to reduce the representation of college chapters to two votes and require that two persons be present, in order to cast the entire quota of votes for the chapter. In other words, one person could cast no more than one vote. The second alternative is to reduce the representation of college chapters to one vote.

The Committee agreed unanimously that it was necessary to reduce the representation of college units in proportion to the representation of the community units. One reason is that with the multiplication of chapters in metropolitan areas and with the potential of a large number of college chapters in these areas, we are simply going to end up with an over-representation from the larger cities. It was felt that it should be recognized that the college chapters do not play the same role as do the community chapters. They generally do not function throughout the year, they generally represent a smaller community, and their effectiveness is usually limited as compared to a community chapter. Many college units carry on their projects primarily in conjunction with community chapters, and many members of college chapters hold dual membership in other chapters. A reduction in the voting power of college units will relatively enhance the voting power of other chapters and will go a long way to alleviate the problem of domination of the convention by three or four metropolitan areas.

The next suggestion had to do with the process of affiliation of chapters. It was suggested that "before the NAC or Steering Committee may consider affiliation, it must have a report and positive recommendation in writing from the director of organization." This report, of course, could be done by a staff member and approved by the director of organization. It will be noted that this would prevent the Steering Committee or NAC from affiliating a chapter against the wishes of the director of organization, but they could still vote against affiliation of a chapter that comes recommended. It should also be noted that this provision would still permit the convention to affiliate without recommendation from the director of organization.

The next recommendation has to do with multiple chapters within a city. It is recommended that a second or subsequent chapter in any city must be affiliated by a 2/3 majority of those members voting at a meeting of the NAC or National Convention. Under this change it would still be

possible to affiliate additional chapters within a city when necessary, but the process of affiliation would become somewhat more difficult. The Steering Committee would no longer be able to affiliate more than one chapter in a city, but this action would have to be taken by either the NAC or the Convention.

It was also agreed that some kind of limitation of potential votes within each city must be worked out. The Committee did not yet arrive at a working formula but believes that the number of potential votes which a city might have should be based on the population of the city. The idea of granting proportional votes at the convention based on numbers of active members in a chapter was rejected. It was rejected, because the Committee felt this put a premium on gettin active members regardless of quality. Furthermore, it is quite easy for chapters in the North to get large numbers of members, but this is not always the case in many smaller Southern communities. Likewise, it was not felt that the merits of a chapter can be judged by the number of members, since a small chapter may be a great deal more active than some of the larger chapters.

If a limitation of potential votes for the combined chapters in a given city is worked out on the basis of the population of that city, then this will give recognition to the necessity of having multiple chapters in the large metropolitan areas of the country. It will also maintain the equality of votes amongst the chapters (with the exception of the college units) but will recognize the greater responsibility in the metropolitan areas.

One schedule of potential votes for a given city was suggested but not adopted by the Committee. I am including it here, however, simply as an indication of the trend of our thought. This limitation on votes would not include college chapters. If the college representation at the convention were reduced to one vote per chapter, then there would be no need to limit the number of college chapters that can be formed. If, however, the voting strength of college units is more than one vote per chapter, their votes would have to be included in some suggested formula:

Potential Votes Per City

Population	Potential Convention Votes (Excl. College Units)
Up to 500,000	3
500,000 to 1,000,000	6
1,000,000 to 2,000,000	9
2,000,000 to 4,000,000	12
4,000,000 to 6,000,000	15
Over 6,000,000	18

The schedule above or a variation thereof could be worked out so that none of the non-college chapters in New York City would lose any votes. Nor

would any chapters in any other parts of the country have their representation reduced. However, since New York City already has six community chapters, this limitation would virtually freeze the formation of other than college chapters in the city. If other chapters were formed, then all of the chapters in the area would have to have their voting strength reduced slightly.

That completes the list of suggestions. We hope that the full Committee will be able to consider these points and any other points which should be considered so that we may present a full report and a recommendation to the NAC which meets in New York City February 21, 22, and 23. Most of the changes that we have suggested require constitutional changes and would have to be made at the convention.

cc: James Farmer
Richard Haley
James McCain
Marvin Rich
Norman Hill
Floyd McKissick
Rudolph Lombard
Wilfred Ussery
Ralph Rosenfeld
Alan Gartner
Jim Peck

Law Offices

SQUADRON, ALTER & WEINRIB

STEPHEN WEINRIB
DAVID ALTER
HOWARD M. SQUADRON

LAWRENCE H. ROGOVIN
DIRK S. GOULD

EDWARD C. WEINRIB
COUNSEL

32 East 57th Street, New York 22

PLAZA 2-6550

January 23, 1964

George Schiffer, Esq.
40 East 49th Street
New York, N.Y.

Re: State of New York v. Sara Penn et al.

Dear Mr. Schiffer:

We enclose thermofax copy of Defendants-Appellants Brief in the above matter for your records. We expect the cases to be argued on or about February 4th.

Sincerely,

Diana Baylis

Diana Baylis
Secretary to Howard M. Squadron

dlb
Enc.

Law Offices

SQUADRON, ALTER & WEINRIB

STEPHEN WEINRIB
DAVID ALTER
HOWARD M. SQUADRON

LAWRENCE H. ROGOVIN
DIRK S. GOULD

EDWARD C. WEINRIB
COUNSEL

32 East 57th Street, New York 22

PLAZA 2-6550

January 23, 1964

Carl Rachlin, Esq.
280 Broadway
New York, N.Y.

Re: State of New York v. Sara Penn et al.

Dear Mr. Rachlin:

We enclose thermofax copy of Defendants-Appellants Brief in the above matter for your records. We expect the cases to be argued on or about February 4th.

Sincerely,

Diana Baylis

Diana Baylis
Secretary to Howard M. Squadron

dlb
Enc.

xxxxxxxxxxxx
x

165 West 46th Street

LT 1-8700
xxxxxxxxx

January 28, 1964

Howard Squadron, Esq.
32 East 57th Street
New York 22, N. Y.

Dear Howard:

Thank you for your extremely able brief. There are just a few specific suggestions which you might like to consider.

1. Perhaps it might be a good idea to spell out at the argument in a little more detail the nature of the crime being committed by the building trades; how hard it is for a Negro to work in that industry. The Appellate Term ought to be told how few Negroes work, so as to see the picketing was not crackpot.

2. At no time, as you point out, did the police attempt to determine the commission of a crime, but assumed defendants were guilty. They really refused to believe the building trades were guilty of a crime, presumably because the usual evidence of a crime by the trades was not available; thus the police intervened in behalf of the discriminators (Lombard, one of our cases). This might be called an "outside" "sit-in", if you permit me.

3. This was not an act of civil disobedience directed against the Community, but rather a dispute between two private parties. Without thinking, the police assumed it was civil disobedience. The police should have told both to go, or let both stay; not just force one party to leave. This made for a Shelley situation.

4. In Carcel (I argued this one) you might consider that while the decision does not refer to Galpern and the obligation to move when told to do so by the police, implisitly Galpern is ignored since the police told Carcel to leave, he refused; conviction reversed. See Taylor v. Louisiana, U.S. Sup. Ct., June, 1962.

Thanks again. Regards.

Sincerely,

CR/hm

CARL RACHLIN

LAW OFFICES
SCHIFFER & COHEN

FEB 21 REC'D

40 EAST 49TH STREET
NEW YORK 17, N.Y.
PLAZA 2-8060

BARRY LEE COHEN
GEORGE SCHIFFER

February 18, 1964

Percy E. Sutton, Esq.,
Sutton & Sutton,
135 West, 125th Street,
New York, N.Y.

Dear Percy:

I have your letter of February 14, 1964.

1. You saw the record in People vs. Penn. Howard and people associated with him prepared the brief, copy of which, I am sure, they will be glad to furnish to you. Howard argued the case. There was no transcript of the argument that I know of.

2. The Penn case is an acceptable test case, based on its record, a point on which we all agreed before the case was selected.

3. The people in schedule "A" are those having sentences of five days or less; the people in schedule "B" are those having sentences in excess of five days.

4. I have no objection to your attending any and all conferences relating to the stipulation; on the contrary, I would welcome your active participation; I would welcome your substituting for me entirely. I understood from my previous conversation that it was not necessary to notify you of meetings. You are a pretty harassed and busy man, Percy, and not always easy to get hold of.

I intend to secure the individual consent of each defendant affected by the stipulation before it becomes

GEORGE SCHIFFER
SARA LEE CORP.

effective. No person who does not consent will be included in the stipulation. Carl, Howard and I have put a considerable amount of time into working out a program to relieve trial counsel of the considerable work load which would be involved in the series of appeals. We have at all times endeavoured to be in touch and to protect the interest of all concerned. I would not want to read your letter as implying otherwise.

Sincerely yours,

George Schiffer

cc: Carl Rachlin, Esq.
Howard Squadron, Esq.

MEMORANDUM FROM SCHIFFER & COHEN

40 EAST 49TH STREET, NEW YORK, N. Y. 10017 • PLaza 2-8060

FEB 19 RECD

TO: CARL RACHLIN, ESQ. DATE: 2/18/64

RE: CORE Penn Case

On Friday February the 14th, Dick Uviller and I went to see Judge Hecht to secure his approval of the stipulation. The conference was very pleasant. Hecht indicated that while he approved in principle, he would have to talk to some of the other judges. Both Dick and I had the feeling that there would be no problem having the thing approved.

As to Penn, Hecht made only two relevant comments. The first was the question was extremely interesting. The second was that he was sure that the case would go to the Court of Appeals and that he had no doubt that the Supreme Court would grant certiorari if that became necessary.

Sincerely,

George Schiffer

LAW OFFICES
SCHIFFER & COHEN

BARRY LEE COHEN
GEORGE SCHIFFER

40 EAST 49TH STREET
NEW YORK 17, N.Y.
PLAZA 2-8060

JUN 26 1964 File (N.Y.)St v. Penn

June 25, 1964

The Honorable Bernard Botein,
Presiding Justice Appellate Division,
Supreme Court of the State of New York,
First Department,
U.S. Court House,
Foley Square,
New York, N.Y. 10007

Dear Judge Botein:

Last summer Michael H. Schwerner sat down, with a group of other people, in front of a truck on a construction site in New York County to protest discrimination by unions in the construction industry against Negroes and Puerto Ricans. He was arrested and charged with violation of §722, subdivision 2 of the Penal Law. He was tried before the Honorable T. Vincent Quinn, who found him guilty. The Honorable Justice sentenced Mr. Schwerner to the City Prison Workhouse for a period of 60 days.

On the same date, July 24, 1964, Rita Schwerner, Mickey's wife, pleaded guilty to a charge of disorderly conduct arising out of the same circumstances and was sentenced by the same judge to a term of 30 days.

Prior to imposing sentence, the Court engaged in the following colloquy with the defendant Mickey Schwerner and the other defendants, then standing before the Court convicted of the same charge:

> "THE COURT: Mr. Harold Kerster, do you intend to continue this type of conduct of which you have been convicted?
>
> DEFENDANT KERSTER: Yes, Sir .

SCHIFFER & COHEN

MR. McCAULEY (Attorney for defendants): Your Honor, may I speak?

THE COURT : Yes.

MR. McCAULEY : It strikes me that as a general matter we don't ask people to promise to do or not to do things like this.

THE COURT : On the question of sentence, remorse is very important.

MR. McCAULEY : It becomes very difficult for these people to say that they will or will not engage in a particular event because all of these events differ.

THE COURT : I asked him specifically about the type of conduct of which he has been convicted.

MR. McCAULEY : I would like to take an exception to that question that you asked.

THE COURT : Absolutely. ***

THE COURT : All right. Michael Schwerner?

DEFENDANT SCHWERNER: If I am ordered to and it is deemed necessary to fight discrimination in this manner, I will have to do it, yes.

THE COURT : Ordered to do it by whom?

DEFENDANT SCHWERNER : Directed to, then, by any organization which I deem a responsible organization.*

I was retained as counsel by Rita and Mickey Schwerner to take an appeal. Notice of appeal was duly filed and a certificate of reasonable doubt was granted. Pursuant to a

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COPY

stipulation entered into between myself as counsel for these defendants and the District Attorney of New York County, these appeals are still pending and abide the result in the case of People vs. Penn, a case involving similar facts which was argued to the Appellate Term in February 1964, but remains undecided.

On Sunday, June 21, 1964, Mickey Schwerner disappeared in or about Philadelphia, Mississipi. The car in which he was known to be traveling was discovered gutted by fire near a large swamp. At the time of this writing, Federal law enforcement officials have abandoned hope of discovering Mickey or his two companions alive.

Mickey was in Mississipi as director of the CORE Community Center in Meridian community center. This is one of a number of such centers maintained in Mississipi by the Congress of Racial Equality to supply the defects of the illegally segregated Mississipi school system. Rita, at the time of Mickey's disappearance, was in Ohio engaged in training volunteers to join the Schwerners in their work.

The Schwerners are in all respects exceptional people. Rita is a trained teacher. Mickey, graduated from Cornell University in 1957, did graduate work at the Columbia School of Social Work and was subsequently employed by Hamilton Madison House. These two young people surrendered security and substantial careers to go to Meridian. Shortly before his death, Mickey made the following statement:

> "As a social worker, I have dedicated my life to social ills; however, my profession, except in isolated instances has yet not become directly involved in the most devastating social disease of the present time - discrimination. I also feel that the Negro in the South has an even more bitter fight ahead of him than in the North and I wish to be part of that fight. In essence, I would feel guilty and almost hypocritical if I do not give full time for an extended period.

COPY

FFER & COHEN

The vocation for the rest of my life is and will be to work for an integrated society. I plan to do this work primarily in New York City where my roots are but I feel that it is important that I have a first hand understanding of how people of other sections of the country specifically are affected by prejudice and how discrimination is being dealt with."

I confess that I do not know how to proceed at this time. Mickey must be presumed dead, murdered. The case against him therefore fails. Yet, he and his parents and his wife are entitled to have the erroneous conviction reversed. A pardon will not serve the purpose. I cannot conceive that it is the law of New York that Mickey Schwerner should go to his death convicted of disorderly conduct for affirming his beliefs in a positive, practical way.

As his counsel, I had occasion to discuss with Mickey his principles leading to his arrest and conviction. He deeply subscribed to the principle of non-violence. He deeply felt that if the Constitution of the United States and the Constitution of the State of New York and the laws of the State of New York are deliberately violated with the tacit approval of sworn, public authorities, the citizen is required to take reasonable action to protest. Mickey felt it a duty, not a mere right, for the citizen to act in defense of constitutional principles. This duty, to support the Constitution, not merely to obey it, is laid upon our public officials, all attorneys. Yet, this portion of the oath of office is historically only redundant. From the founders of our nation to the architects of the Nuremberg trials, the obligation is laid upon the individual citizen to oppose lawless, unconstitutional or unnatural conduct on the part of constituted authorities. The very doctrine of separation of powers is designed to support the performance of that obligation.

COPY

The Honorable Bernard Botein June 25, 1964

The vindication of Mickey Schwerner is necessary. The question is, how it may be accomplished.

Respectfully submitted,

George Schiffer

cc: The Honorable Frank Hogan

Richard Uviller, Esq.

bcc:Carl Rachlin, Esq.
Val Coleman

Law Offices

SQUADRON, ALTER & WEINRIB

STEPHEN WEINRIB
DAVID ALTER
HOWARD M. SQUADRON

LAWRENCE H. ROGOVIN
DIRK S. GOULD

EDWARD C. WEINRIB
COUNSEL

32 East 57th Street, New York 10022

PLAZA 2-6550

OCT 29 REC'D

October 28, 1964

Carl Rachlin, Esq.
165 West 46th Street
New York, New York

Re: People v. Sara Penn et al.

Dear Carl:

As you know, the Appellate Term filed its decision in the above matter on October 15. The judgments of conviction were affirmed by a two to one vote. The majority wrote an 11-page opinion. No doubt, they felt this necessary because Judge Hofstadter wrote a 19-page dissent supported by six additional pages of footnotes; and as you know, Judge Hofstadter is generally regarded as a sound and thoughtful jurist and student of the law.

After reviewing the majority and dissenting opinions carefully, I am persuaded that a further appeal should be taken; if possible (and we are researching the question), we should go directly to the Court of Appeals. The majority does not, in my opinion, deal directly with the hard questions involved in the case. They make the logical jump from obstruction of others to unpeacefulness; and I do not think any such jump can be justified. They treat the constitutional questions too cavalierly. They express sympathy, but they give no legal credence to the objective of the obstruction, to the limited nature of the persons and acti-ties obstructed or to the violations of anti-discrimination laws that led to the obstruction.

Judge Hofstadter on the other hand deals with each of these issues - as well as with others that were never presented to the court. (For example, he would reverse because the eleven defendants were tried together, even though we stipulated to a joint trial.) He specifically holds that there was no unpeaceful - and therefore no disorderly - conduct under the statute. He specifically holds that the court's exclusion of the "evidence concerning the existence and effect of racial discrimination in

employment ... was grievous, reversible error." He specifically holds that "the defendants' conduct came within the protective shelter of the First Amendment"; and that "the orders of policemen could not make the conduct of the defendants, otherwise lawful, unlawful."

He states that protest is supposed to be potent and effective; and he cites all of the 1963 and 1964 decisions of the Supreme Court of the United States supporting the proposition that the state may not interfere with peaceful protests, reasonably based, against discrimination and segregation. Finally, he makes a strong plea for the judicial sanctioning of such protests as part of the process "by which fundamental social readjustments in our country can be measured." He states specifically "The challenge is upon everybody to establish the justice of the Negro's many grievances--it is essential to racial peace. The problem must be solved by all possible skills of citizenship and government--this includes the judicial branch so far as it lies in its competence."

In brief, Judge Hofstadter's opinion is a significant - and probably a great - one; and the case deserves to be carried further for that reason as well as for all of the other compelling reasons that made us decide in the first instance to make this the "test" case of all the sit-in cases arising from the demonstrations during the summer of 1963.

This should not depend on the cost of printing the record. If CORE intends to continue demonstrations in the North, it must have money for some "test" cases; and there could not be any other in better posture for Appellate consideration.

Since jail sentences - and some rather severe ones - of over 100 other defendants depend on the final disposition of this case, I should like authorization in any event to file Notice of Appeal and to arrange an appointment for you and George Schiffer and me to meet with Mr. Uviller to discuss the attitude of the District Attorney's office at this point.

Please let me hear from you.

Sincerely,

Howard

Howard M. Squadron

HMS:ca
cc: Mr. Alan Rosenberg

P.S. I am sending copy of this letter to each of the defendants in lieu of a separate report; and I should appreciate any comments they may have. Unless I hear to the contrary, I shall assume that we are authorized to proceed with any appeal approved by you for CORE.

Dear Howard

Thank you for your excellent report. It does without saying that should appeal. Please take the necessary steps.

Do you wish to set up the meeting with Voelker or shall I?

Regards

Cordially
Schuyler

d/u 11/9

November 2, 1964

Howard M. Squadron, Esq.
Squadron, Alter & Weinrib
32 East 57th Street
New York, N.Y. 10022

Dear Howard,

Thank you for your excellent report. It goes without saying we should appeal. Please take the necessary steps.

Do you wish to set up the meeting with Uviller or shall I?

Regards,

Carl Rachlin
General Counsel

cc: George Schiffer, Esq. with copy of Squadron letter of 10/28 (to Jules)

CR:hdl

11/10 Call Seay & ask him for me
Theus atty
Mr Uviller said there is nothing can be done
Appointment with Judge Field about the other cases
Fri. 3 P.M.
Schiffer said he can't come at his office

Lawson

November 24, 1964

Howard M. Squadron, Esq.
32 East 57th Street
New York, N.Y.

George Schiffer, Esq.
40 East 49th Street
New York, N.Y.

Marvin M. Karpatkin, Esq.
660 Madison Avenue
New York, N.Y.

Re: People v. Penn
People v. Lawson
People v. Collins

Dear Howard, George and Marvin:

As you all know, Howard and I appeared before Judge Fuld and he executed certificates in both the Penn and Lawson cases, and previously, of course, Judge Scileppi granted the certificate in the Collins case. Judge Fuld made a note for the Clerk of the Court to set Penn and Collins, as I recall, for the same argument date.

In any event, I hope that our briefs can be ready fairly soon. I would like your thoughts on the questions as to whether I should seek permission of the Court to submit a brief to argue as amicus in order to state the more principled position, since I would be free of the responsibility that you would have in terms of the obligations to the respective clients. My inclination is to do this and I would like your thoughts on it.

I would also hope that drafts of all briefs will be circulated around so that we will not be saying things in one case which might conceivably put us into difficulty in one of the others.

With kindest regards.

Carl Rachlin
General Counsel

CR:bdl

Law Offices

SQUADRON, ALTER & WEINRIB

STEPHEN WEINRIB
DAVID ALTER
HOWARD M. SQUADRON

LAWRENCE H. ROGOVIN
DIRK S. GOULD

EDWARD C. WEINRIB
COUNSEL

32 East 57th Street, New York 10022

PLAZA 2-6550

April 6, 1965

Raymond J. Cannon,
Clerk
Court of Appeals
State of New York
Albany 7, New York

APR 7 RECD

Re: People v. Penn, et al.

Dear Mr. Cannon:

Thank you for your letter of April 5, 1965 advising that the above matter will appear for oral argument on the day calendar on Monday, April 19, 1965 at 2:00 p.m.

We shall require 45 minutes for oral argument on behalf of the appellants. If it is at all possible, we should like to have ten minutes of that time reserved for rebuttal.

The principal oral argument will be presented by Howard M. Squadron, whose home address is 25 West 81st Street and home telephone number is TR 7-8738. If at all possible, we should like permission to have the rebuttal argument presented by co-counsel, Carl Rachlin, who is the general counsel for the Congress of Racial Equality and who served as counsel before the Supreme Court of the United States on some of the principal relevant cases. Mr. Rachlin's home address is 187 Crown Street, Brooklyn, New York and his home phone number is PR 4-7918.

We should appreciate hearing from you as to whether rebuttal argument by Mr. Rachlin will be permitted.

Very truly yours,

Howard M. Squadron

HMS:kr

cc: Carl Rachlin
Alan Rosenberg

State of New York
Court of Appeals

APR 13 REC'D

Raymond J. Cannon
Clerk

Clerk's Office
Albany 7

April 9, 1965

Howard M. Squadron, Esq.
Squadron, Alter & Weinrib
Counsellors at Law
32 East 57th Street
New York, New York 10022

Re: People v. Penn, et al.

Dear Mr. Squadron:

The Court is most reluctant to permit two arguments on one side even where the time is shared and the application to do so must be made orally at the time the case is called. Ten minutes is about double the usual permitted time for rebuttal.

Very truly yours,

Raymond J. Cannon

Clerk

Dear Carl:

Do you want to take the chance that the request will be granted at the oral argument? Please advise.

HOWARD

April 14, 1965

Howard M. Squadron, Esq.
32 East 57th Street
New York, N.Y.

Re: Penn

Dear Howard:

Thank you for the letters in Penn. I am inclined to think, based in good part on my experience the other day in Lawson, that we should accept Mr. Cannon's edict gracefully. They were not permitting rebuttals at all the other day.

I know you will convey anything I wanted to say anyway, particularly the point that we discussed at length concerning the effort needed to get the court to understand the nature of the crime committed by the building industry and the inability of the police, the District Attorney and the lower courts to grasp this simple fact. The crime is on the other shoe, if you will permit the metaphore mixing.

One other thought: that I think important: despite the misuse of terms and the need for hero-projecting, this was not an act of civil disobedience. It seems to me this must be stressed above all in order to get the court to listen in the first place. The action here involved a dispute between an industry that was discriminating and public minded citizens who were protesting that discrimination and calling it to the attention of the public. For the act to be civil disobedience it must be directed against the public. The acts of the appellants were not only not against the public but in support of the public policy of the United States, State of New York and City of New York.

If you would like me to meet with you over the week-end to set up a moot court, I am at your service.

Affectionately,

Carl Rachlin
General Counsel

CR:hdl

April 14, 1965

Howard M. Squadron, Esq.
32 East 57th Street
New York, N.Y.

Re: Penn

Dear Howard:

Thank you for the letters in Penn. I am inclined to think, based in good part on my experience the other day in Lawson, that we should accept Mr. Cannon's edict gracefully. They were not permitting rebuttals at all the other day.

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If you would like me to meet with you over the week-end to set up a moot court, I am at your service.

Affectionately,

Carl Rachlin
General Counsel

CR:hdl

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W. P. MARSHALL, PRESIDENT

SF-1201 (4-60)

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1965 MAY 20 PM 6 51

HOWARD M SQUADRON

32 EAST 57 ST NYK CAGD

PEOPLE V. PENN

JUDGEMENT AFFIRMED. NO OPINION. ALL CONCUR.

RAYMOND J CANNON CLERK, COURT OF APPEALS ALBANY NY

(48).

You can't win them all. Please advise whether you want us to go to the Supreme Court.

HMS

May 27, 1965

Howard Squadron, Esq.
32 E. 57th Street
New York, N. Y.

Dear Howard:

I agree with you that it was tough losing Penn even though it was an extremely difficult case. As we all know, a lot of people depend on this case and after considerable thinking, I believe we should file a petition for certiorari with the U. S. Supreme Court.

The expense at this point is not sufficiently great since we do not have to print the record but merely need a certified copy of the record used in the Court of Appeals. All we would have to do is pay for the petition itself.

There are federal issues which might conceivably interest the Supreme Court, difficult as the case is.

Could you send me a copy of the record and we can start working on the petition for certiorari. I have a number of hotshot Supreme Court lawyers who would be glad to work on the petition so that we can get it moving quite rapidly.

Framing the federal issues will be difficult but that is because the case itself is difficult. As soon as we have a draft of the petition for certiorari, I will bring it up to you and we can go over it line by line.

With best regards,

Yours very truly,

CR:YS

Carl Rachlin

CC: George Schiffer

Law Offices

SQUADRON, ALTER & WEINRIB

STEPHEN WEINRIB
DAVID ALTER
HOWARD M. SQUADRON

LAWRENCE H. ROGOVIN
DIRK S. GOULD

EDWARD C. WEINRIB
COUNSEL

32 East 57th Street, New York 10022

PLAZA 2-6550

JUN 7 REC'D

June 4, 1965

Carl Rachlin, Esq.
165 West 46th Street
New York, New York

Re: People v. Penn

Dear Carl:

Thank you for your letter of May 27th. As you know, we arranged to dispense with the printing of the record on appeal in the above matter. The record before the Court of Appeals consisted of the trial transcript and the exhibits which were offered in evidence, but not accepted, at the trial. We can send the transcript and such copies of the exhibits that we have, to you by messenger, but that will not solve the problem of Court of Appeals certification that those documents constitute the record. Perhaps it would be better to apply to the Court of Appeals Clerk for certification, accompanied by the Clerk's copy of the papers themselves.

Of course, I am delighted that you have decided to pursue the matter to the Supreme Court and I intend to continue to serve as attorney of record, and argue the case along with you, if you are agreeable.

Best personal regards.

Sincerely,

Howard

Howard M. Squadron

HMS:kr
Enc.

P.S. I enclose a headline that gave me a bit of a start the other day.

October 8, 1963

Hon. Norman F. Cuiler
Justice of the Supreme Court
of the State of New York
100 Centre Street
New York, N.Y.

Re: Harold L. Ker M. Ingram et al.

Dear Judge Cullen:

Please forgive our writing a letter to you in connection with the above matter. However, Assistant District Attorney Herbert Hoh's supplementary affidavit of October 7, 1963, submitted in opposition to defendants' application for certificate of reasonable doubt in the above-entitled action, requires a brief reply. A copy of this letter will be immediately delivered to Mr. Hoh's office.

Mr. Hoh asserts that a large number of defendants have been arrested of disorderly conduct and other crimes, from 16th July 1964 in the protest-against-discrimination demonstrations (supplementary affidavit, paragraph 4). He does not, however, point this to the moving affidavits [illegible] contradict the principal point made in the moving affidavits [illegible], i.e. that this is a unique crime since it does not involve (as did many of the previous crimes in which Mr. Hoh concedes satisfaction of reasonable doubt were granted) any unpeaceful or possibly unpeaceful act by any defendant, or by any member of the on-looking public.

The point is that this case raises the legal question, never finally ruled upon by previous case, as to whether [illegible] conduct intended to breach the peace or disorderly breach of peace may be sustained, [illegible] on behalf of the State that the traffic on Rockaway Parkway was [illegible] and was not obstructed, that no unpeaceful act was contemplated or threatened by any defendant; and that there was no [illegible] or threatened by any defendant; and that there was no [illegible] any act of disturbance, belligerency, lawless, violence, [illegible] [illegible] of any breach of the peace, [illegible] by any defendant or [illegible] of the public at the scene, [illegible] [illegible] of peace, or a disturbance breach of peace. As the basis for

Mrs. Abraham L. Miller

- 2 -

September 4, 1963

remarks in behalf of constitutional and the case in which he appears is relied in part upon, along with legitimate academic material, should be entitled to the benefit of a presumption of reasonable doubt already granted in so many lesser valuable cases.

Finally, with respect to paragraph 12 of said supplementary affidavit, Your Honor should be advised that the bail posted in behalf of defendants Hamer and Rivers was obtained by a civil rights organization and will have to be repaid to that organization. It is not accurate to suggest, as Mr. Kuh does, that defendants Hamer and Rivers in fact have money available, when they have told me they do not.

Respectfully,

Howard M. Squadron

HMS:dlh
cc: Assistant District Attorney Kuh
By Hand

November 15, 1965

Mr. John Davis, Clerk
United States Supreme Court
Washington, D. C.

RE: People v. Sarah Penn, et. al

Dear Sir:

We are presently seeking Certiorari in the above mentioned case. The conviction of the defendants was affirmed by the Court of Appeals of the State of New York earlier this year. That appeal was taken on the original record sent up by the Criminal Court of the City of New York, County ofNNew York. The record was sent back to the Clerk of the Criminal Court after the Remittitur was amended. In order to perfectoour petition for Certiorari, we must submit the record. Unfortunately, the Clerk of the Criminal Court can not send a certified record to the Supreme Court unless he receives a request to do so from you, If this is not possible, an assurance from you that the record would be returned to the Criminal Court after a determination by the Supreme Court might suffice.

Please advise as soon as possible as to which (or any other) alternative would be satisfactory.

Very truly yours,

SMN/cs

STEPHEN M. NAGLER

Law Offices

SQUADRON & PLESENT

HOWARD M. SQUADRON
STANLEY PLESENT
LAWRENCE H. ROGOVIN
NAOMI LEVINE
LESTER GREENBERG

32 East 57th Street, New York 10022

PLAZA 2-6550

February 19, 1966

Robert Kasanof, Esq.
52 Broadway
New York, New York

Re: People v. Penn, et al.

Dear Mr. Kasanof:

The legal argument in the petition for certiorari is excellent. I would have had some suggestions with regard to the statement of facts, but received the page proof too late to be able to comment.

I think there will be some problems with the elaboration of the legal argument if the petition is granted. I hope you and Carl and I will be able to get together promptly in that event, to discuss the entire matter.

Sincerely,

HMS:kr

Howard M. Squadron

cc: Carl Kaplin

February 17, 1966

Robert Kasanof, Esq.
52 Broadway
New York, New York 10004

Dear Bob:

Here they are, with love, affection, and of course, thanks.

Cordially,

SMN/cs
Enc.

STEPHEN M. NAGLER

rec'd 2/21/66

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

February 18, 1966

Carl Rachlin, Esq.
38 Park Row
New York, N. Y.

RE: PENN ET AL. v. NEW YORK
No. 1041, October Term, 1965

Dear Mr. Rachlin:

I received your letter of February 17, together with a check in payment of the docket fee, in connection with the above-entitled case. This case was docketed February 18, 1966, as No. 1041, October Term, 1965.

The enclosed forms for entry of appearance of counsel should be completed on both sides and returned to this office.

Also enclosed is a form for notifying opposing counsel that the case was docketed. Proof of service of this notification is not necessary.

Very truly yours,

JOHN F. DAVIS, Clerk

By Jennie H. Lazowski

(Miss) Jennie H. Lazowski
Assistant

jmh
Enclosures

pmt 2/23/66

March 8, 1966

Mr. Robert Kasanof
52 Broadway
New York, New York

Dear Bob:

Let me put in writing what I told your lovely wife on the phone after I had read your petition for Penn v. New York. It is an extraordinarly fine piece of work and one with which I am proud to associate myself. When we first talked about this I must confess that I thought that the ideals buzzing around my head were probably absurd since I could not seem to get competent lawyers to develope them. You have not only organized in a remarkable able manner the thoughts you and I have previously discussed, but have put them down so completly on paper that I honestly believe we have a fighting chance, whereas before I thought it was pretty hopeless.

As you know, this is the first important northern civil rights case to go to the Supreme Court. If nothing else, hopefully, we can at least get the Court to think in northern terms. So please accept thanks from Steve and me. I hope that we get a chance to argue this before the Supreme Court. It has interesting possibilities beyond even those we discussed, in light of the decision we received last week in Brown v. Louisiana. A few more victories like that and we may all go under.

With best regards,

Sincerely yours,

Carl Rachlin
General Counsel

CR/blc

April 18, 1966

Professor Norman Dawson
N.Y.U. Law School
Waverly Place
New York, New York

Dear Prof. Dawson:

Enclosed is a copy of the Penn petition. Carl viewed the primary purpose of this petition as "educationally" I don't know how much "education" the Court got from it but we have had no indication that any Justice was willing to grant certiorari.

Cordially,

SMN:tp
Encl:

Stephen M. Nagler
Associate to the General
Counsel

December 7 1966

Alan Levine, Esq.
N.Y. Civil Liberties Union
156 Fifth Avenue
New York, New York

Dear Alan:

Enclosed is a copy of the motion for reargument and to amend the remittitur in the case of People v. Sarah Penn. It was prepared by Bob Kasanof, who really knows his business. Its primary purpose, as you can see from the affidavit, was to get the court to say that they passed on theconstitutional issues in the case (decided without opinion). In other words, it was not a really serious effort to convince the court to grant reargument. If you have that in mind, your affidavit should be drafted accordingly and should, I expect, incorporate by reference your brief styled as a memorandum.

If there is any other help that I can give in this matter, please get in touch with me.

As ever,

Stephen M. Nagler
Associate General Counsel

SMN:ns
Enclosure

Law Offices

SQUADRON, ALTER & WEINRIB

32 EAST 57TH STREET

NEW YORK, N. Y. 10022

PLAZA 2-6550

July 7, 1965

CORE
c/o Carl Rachlin, Esq.
165 West 46th Street
New York, New York

- to -

Squadron, Alter & Weinrib

S T A T E M E N T

TO PROFESSIONAL SERVICES RENDERED

May 29, 1964		$38.00
June 22, 1964		32.00
November 19, 1964	- balance -	171.01
May 7, 1965		34.68
	TOTAL DUE	$275.69

Law Offices

SQUADRON, ALTER & WEINRIB

32 EAST 57TH STREET

NEW YORK, N. Y. 10022

PLAZA 2-6550

June 1, 1965

CORE
c/o Carl Rachlin, Esq.
165 West 46th Street
New York, New York

- to -

Squadron, Alter & Weinrib

S T A T E M E N T

TO PROFESSIONAL SERVICES RENDERED

June 22, 1964		$32.00
November 19, 1964	- balance	171.01
May 7, 1965		34.68
	BALANCE DUE	$237.69

455 SCORE
46

STATE OF NEW YORK VS. RAY, JESSE, 1965
(POLICE BRUTALITY)

Box 41
Folder 1

State Historical Society of Wisconsin

Please Retain Original Order

CRIMINAL COURT : COUNTY OF BRONX

The People of the State of New York

against

JESSE RAY,
Defendant.

TO THE CLERK OF THE CRIMINAL COURT, COUNTY OF BRONX

SIR:

You are hereby notified that the undersigned appears as attorney for the defendant JESSE RAY in the above entitled action.

Dated June 4, 1965.

STEPHEN M. NAGLER
Attorney for Defendant,
Office and P. O. Address:
George Schiffer
40 East 49th Street
New York, New York 10017

CRIMINAL COURT CITY OF NEW YORK
COUNTY OF BRONX

----------x

PEOPLE OF THE STATE OF NEW YORK

Respondent,

- against -

JESSE RAY,

Defendant-Appellant.

----------x

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE, that the defendant herein hereby appeals to the Appellate Term of the Sup. Ct. 1st Dep't from the judgment of conviction rendered against him in this Court for violation of Section 722, subdivision 2 of the Penal Law on the 4th day of June 1965, and from each and every intermediate order therein made and from the sentence herein imposed on the same day by Hon. Arthur Braun, Judge of the Criminal Court of the City of New York, said sentence being ten days imprisonment (suspended).

Dated: New York, New York
June 18, 1965

Yours, etc.

STEPHEN M. NAGLER, ESQ.
Attorney for Defendant
Office & P.O. Address
George Schiffer, Esq.
40 East 49 Street
New York 17, N.Y.

TO: HON. ISIDORE DOLLINGER, District Attorney
Bronx County
851 Grand Concourse
Bronx, New York 10451

CLERK, CRIMINAL COURT BRONX COUNTY
851 Grand Concourse
Bronx, New York 10451

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SUPREME COURT OF THE STATE OF NEW YORK
FIRST DEPARTMENT: APPELLATE TERM

.....X

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

JESSE RAY,

Defendant-Appellant.

.....X

STATEMENT UNDER RULE 5531 CPLR

This is an appeal from a judgment of a conviction of defendant-appellant of one count from a complaint charging violation of § 722 of the Penal Law of the State of New York.

1. The above entitled action, Criminal Court of the City of New York, Index #3553-'65.

2. The parties below were the People of the State of New York and Jesse Ray.

3. Case was commenced in the Criminal Court of the City of New York, Part 2A, Bronx County.

4. Action against appellant was commenced April 23, 1965, in the night court of the Criminal Court of the City of New York.

5. The defendant-appellant was charged and tried for violation of §722 (2) of the Penal Law of the State of New York.

6. This is an appeal from a judgment of conviction for having violated §722 of the Penal Law, entered June 4, 1965.

7. The appendix method is not being followed.

Stephen M. Nagler

STEPHEN M. NAGLER
Attorney for Appellant

SUPREME COURT OF THE STATE OF NEW YORK
FIRST DEPARTMENT: APPELLATE TERM
.....X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent

- against -

JESSE RAY,

Defendant-Appellant

.....X

STATEMENT PURSUANT TO RULE II (2)(c)

Appellant was paroled on his own recognizance and no bail was imposed.

Appellant received a 10 days suspended sentence and no fine was imposed.

Stephen M. Nagler

STEPHEN M. NAGLER
Attorney for Appellant

CRIMINAL COURT CITY OF NEW YORK
COUNTY OF BRONX

.....X

PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

JESSE RAY,

Defendant-Appellant.

.....X

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE, that the defendant herein hereby appeals to the Appellate Term of the Supreme Court, First Department from the judgment of conviction rendered against him in this Court for violation of Section 722, subdivision 2 of the Penal Law on the 4th day of June, 1965, and from each and every intermediate order therein made and from the sentence herein imposed on the same day by Hon. Arthur Braun, Judge of the Criminal Court of the City of New York, said sentence being ten days imprisonment (suspended).

Dated: New York, New York
June 18, 1965

Yours,etc.

STEPHEN M. NAGLER, ESQ.
Attorney for Defendant
Office & P.O. Address
George Schiffer, Esq.
40 E. 49th Street
New York 17, N.Y.

TO: HON. ISIDORE DOLLINGER,
District Attorney
Bronx County
851 Grand Concourse
Bronx, New York 10451

CLERK, CRIMINAL COURT BRONX COUNTY
851 Grand Concourse
Bronx, New York 10451

CERTIFIED COPY OF COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
FIRST DEPARTMENT: APPELLATE TERM

.....X

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

JESSE RAY,

Defendant-Appellant.

.....X

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK) SS;
COUNTY OF NEW YORK)

STEPHEN M. NAGLER, being duly sworn, deposes and says that he is the attorney for the appellant herein.

No opinion in writing was handed down by the Court below.

Stephen M. Nagler
STEPHEN M. NAGLER

Sworn to before me
this day of
1965.

DEFENDANT'S CRIMINAL RECORDS

Certification by Attorney

Pursuant to Section 458 of the Code of Criminal Procedure and Section 2105 of the Civil Practice Law and Rules, the undersigned attorney for the defendant hereby certifies that the foregoing record on appeal contains a copy of the Notice of Appeal, the Complaint, the Minutes of Trial, and the Minutes of Sentencing and that said record has been compared by me with the originals and it is a true and correct copy of the transcript of the whole of such originals.

Dated:

Stephen M. Nagler
Attorney for Defendant

ORDER SETTLING CASE

The foregoing case on appeal, containing all the evidence is hereby settled and ordered on file.

Dated:

Judge, Criminal Court of
the City of New York

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

.....X

PEOPLE OF THE STATE OF NEW YORK

Respondent,

- against -

JESSE RAY,

Defendant-Appellant.

.....X

CLERK'S RETURN ON APPEAL

I, the undersigned, Clerk of the above-named Court, respectfully make return to the Appellate Term of the Supreme Court for the First Judicial Department and certify upon the affidavit of the appellant's attorney that there are hereto attached correct copies of the Notice of Appeal and of all papers required to be returned pursuant to the Criminal Court Act of the City of New York and the Rules and Regulations of the Appellate Term of the Supreme Court for the First Judicial Department.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the above-named Court this..... day of.....19.....

.....

Clerk

SUPREME COURT OF THE STATE OF NEW YORK
FIRST DEPARTMENT: APPELLATE TERM

.....X

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

JESSE RAY,

Defendant-Appellant.

.....X

IT IS HEREBY STIPULATED AND AGREED by and between the attorney for the defendant-appellant and the District Attorney that the appeal in the above entitled action shall be limited to the proceedings had on trial and sentence and it is

FURTHER STIPULATED AND AGREED that the arraignment and/or adjournment minutes need not be reproduced since no error is assigned with respect to either or both, and that any question with respect thereto is waived. In the event the District Attorney deems it necessary, the arraignment and/or any adjournment minutes shall be included in the record, and it is

FURTHER STIPULATED AND AGREED that the exhibits, if any, need not be made part of the record but that the originals will be submitted to the appellate court on or before the call of the calendar.

Stephen M. Nagler

Attorney for the
defendant-appellant

Dated:

District Attorney

To be argued by

Stephen M. Nagler

SUPREME COURT OF THE STATE OF NEW YORK
FIRST DEPARTMENT: APPELLATE TERM

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

- against -

JESSE RAY,

Defendant-Appellant.

BRIEF OF APPELLANT

STEPHEN M. NAGLER, ESQ.
Attorny for Defendant-
Appellant
CORE
38 Park Row
New York, N.Y. 10038

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STATEMENT OF FACTS

On April 23, 1965, at about 8:00 p m, defendant was driving east on 138 Street in the Bronx. He stopped for a red light behind some other cars at the intersection of St. Ann's Ave and 138 Street. After the light changed, he honked his horn because a taxi in front of him refused to move and was blocking traffic. Patrolman Brendan Tumulty came over to the defendant's car and told him to get out. Defendant did as he was told but protested that the policeman had let the taxi which was blocking traffic go because the driver was white and that the officer was going to give him (Ray) a summons because he was a Negro. For saying this the defendant was arrested, handcuffed and taken to the 40th Precinct Station House, and charged with violating section 722 (2) of the Penal Law. Although there were quite a few people in the street this evening (R. pg. 10), only five or six people were standing and watching at the

time defendant said he was receiving a summons because he was a Negro (R. pg. 10). There were about 20 people shortly thereafter when the defendant was arrested (R. pg. 12) and they were standing around quietly, observing what was taking place (R. pg. 13), and there was no indication that anyone was in the least disturbed by the discussion between the defendant and the police officer.

TABLE OF STATUTES

§ 722 DISORDERLY CONDUCT

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

.... 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

3. Congregates with others on a public street and refuses to move on when ordered by the police;

4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;

TABLE OF STATUTES

§§ 722 DISORDERLY CONDUCT

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.... 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

3. Congregates with others on a public street and refuses to move on when ordered by the police;

4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;

SUMMARY OF ARGUMENT

POINT I - NONE OF THE DEFENDANT'S ACTS TENDED IN ANY WAY TOWARD A "BREACH OF THE PEACE," REQUIRED UNDER PENAL LAW § 722.

POINT II - NOTHING DONE BY DEFENDANT WAS SUFFICIENT TO "ANNOY, DISTURB, INTERFERE WITH, OBSTRUCT, OR BE OFFENSIVE TO OTHERS" TO CONSTITUTE A VIOLATION OF § 722 (2).

POINT III - NO OTHER SUBDIVISION OF § 722 OF THE PENAL LAW COULD CONCEIVABLY HAVE BEEN VIOLATED BY DEFENDANT'S CONDUCT.

POINT I

NONE OF THE DEFENDANT'S ACTS TENDED IN ANY WAY TOWARD A "BREACH OF THE PEACE," REQUIRED UNDER PENAL LAW § 722.

In order for an act to be punishable as disorderly conduct, it is necessary that an imminent danger of a breach of the peace be evidenced. People v. Carcel, 3 NY 2d 327 (1957); People v. Nixon, 248 NY 182 (1928); People v. Most, 171 NY 423; People v. Harvey, 307 NY 588 (1954).

In People v. Carcel, supra, the Court of Appeals said, as to the significance of a breach of the peace:

> "The common law definition of 'breach of peace,' though not controlling, is helpful in ascertaining the nature of the acts proscribed by the statute. In People v. Most, 171 NY 423, 429 breach of peace was defined as a 'disturbance of public order by an act of violence,

> or which by causing consternation and and alarm disturbs the peace and quiet of the community...' Cantwell v. Connecticut, 310 US 296, 308... guided by this definition the courts have indicated that something more than a mere inconvenience of pedestrians is required to support a conviction under subdivision 2."

A verbal protest that a proposed citation by a police officer is unjustified, though the protest be a noisy one, can not be said to constitute a breach of the peace under the above definition. Indeed, in several states, a defendant must protest his arrest at the time it occurs, or he is considered to waive certain rights. Thompson v. City of Louisville, 362 US 199. Defendant's peaceful protest here was far more consistent with constitutionally protected free speech, than with a breach of the peace. No "threat of violence" or "fighting words" were in any way indicated by the conduct of the defendant, or of anyone else.

POINT II

NOTHING DONE BY DEFENDANT WAS SUFFICIENT TO "ANNOY, DISTURB, INTERFERE WITH, OBSTRUCT, OR BE OFFENSIVE TO OTHERS" TO CONSTITUTE A VIOLATION OF §§ 722 (2).

There is no indication in the trial record that anyone other than Patrolman Tumulty was in any way annoyed, offended, or inconvenienced by the conduct of the defendant. Even if the annoyance of Patrolman Tumulty was substantial enough to violate §§ 722 (2), the officer does not constitute "others" within the terms of the statute. Although many people were on the street, the record indicates that very few stopped and even these appear to have been nothing more than casual observers, who were in no way even annoyed by the conduct of either the defendant or the police officer. Indeed, had Patrolman Tumulty not decided to approach

the defendant's car, it appears that the attention of people in the street would not have been attracted to the defendant.

Even if the conduct of the defendant did of itself "annoy" others, it was not of sufficient scope to constitute a violation of § 722 (2). In People v. Nixon, supra, a case arising from a labor demonstration, people were parading four abreast on a twelve foot wide sidewalk, occupying one-half of it. The regular amount of traffic could barely get through, and some pedestrians had to walk in the gutter. The Court of Appeals dismissed the § 722(2) charge saying:

> "...As yet, bad manners have not been made punishable by imprisonment...There is nothing to show that any other person could have regarded the defendants' conduct as a threat or as calculated to coerce or impede anyone. In the absence of evidence, we may not infer that the conduct of the defendants was intended as a threat or could be construed, or was an incentive to violence by others."

In People v. Nixon, supra, and People v. Carcel,

supra, the court carefully pointed out that:

> "Men and women constantly congregate or walk upon the streets in groups, quite oblivious to the fact that to some degree they are thereby causing inconvenience to others using the street."

Thus, although such persons certainly fall within the terms of § 722 (2), if read literally, such a reading would be incorrect. Only if a "breach of the peace," has been occasioned, that is, "violence,: or the "threat of violence" or "alarm" are the acts punishable under § 722. If such limitations had not been placed on § 722, the statute would encompass even harmless conduct of the variety indicated here, and each police officer could by the nature of his mood or disposition determine what act or comment was annoying or objectionable in a criminal sense, because it was offensive to him. Cox v. Louisiana, 85 S. Ct. 453 (1965); Edwards v. South Carolina, 372 US 229 (1963); Fields v. South Carolina, 375 US 44 (1964);

Shuttlesworth v. City of Birmingham, 34 LW 4009 (US Sup. Ct, Nov., 1965); Cantwell v. Connecticut, supra. The above cases indicate that a considerable amount of annoyance or inconvenience must be tolerated as protected by the free speech provisions of the First Amendment (Constitution of the United States) before a breach of the peace exists, which the state has power to curb.

POINT III

NO OTHER SUBDIVISION OF § 722 OF THE PENAL LAW COULD CONCEIVABLY HAVE BEEN VIOLATED BY DEFENDANT'S CONDUCT.

There is no indication on the record that the defendant violated any provision of § 722 of the Penal Law. That subd. 2 of § 722 was not violated has been presented above.

Section 722 (3) can only be violated by one who "congregates with <u>others</u>" (emphasis supplied). No "others" exist here.

The pedestrians who stopped to observe the arrest of the defendant do not constitute a "crowd" within the terms of § 722 (4). <u>People</u> v. <u>Phillips</u>, 245 NY 401 (1927); <u>People</u> v. <u>Kieran</u>, 26 NYS 2d 291 (1941); <u>People</u> v. <u>LaSister</u>, 9 Misc. 2d 518(1948).

The other subdivisions of § 722 of the Penal are not even remotely related to the present case.

CONCLUSION

For the reasons stated above, appellant urges that his conviction for violation of § 722 (2) of the Penal Law be reversed and dismissed.

Respectfully submitted,

Stephen M. Nagler
Attorney for Defendant-Appellant

DATED: New York, New York
November 22, 1965

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JESSE RAY,

Defendant-Appellant.

.....

NOTICE OF
ARGUMENT

RECEIVED
1965 NOV 23 PM 1:50
DISTRICT ATTORNEY
BRONX COUNTY

SIR:

Please take notice that defendant's appeal in the above-entitled action will be brought on for argument before this court at the next term thereof, to be held at the Courthouse, 60 Centre Street in the city and county of New York on the 6th day of December; at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated at New York,
this 23rd day of November, 1965.

Yours, etc.,

STEPHEN M. NAGLER

Defendant's Attorney
Office & P. O. Address
CORE-Congress of Racial
Equality
38 Park Row
New York, New York 10038

TO: Hon. Isidor Dollinger,
District Attorney
Bronx County
851 Grand Concourse
Bronx, New York 10451

To be argued by
Stephen M. Nagler

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: FIRST DEPARTMENT

— — — — — — — — — — — —X

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

- against-

JESSE RAY,

Defendant-Appellant.

— — — — — — — — — — — — — —X

BRIEF OF APPELLANT

STEPHEN M. NAGLER, ESQ.
c/o ~~George Schiffer~~ CORE
~~40 East 49th Street~~ 38 PARK ROW
New York, N.Y. 10038
ATTORNEY FOR DEFENDANT-APPELLANT

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SUMMARY OF ARGUMENT.

SUPREME COURT ~~OF THE~~ STATE OF NEW YORK
APPELLATE TERM: FIRST DEPARTMENT

----------x

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

- against -

JESSE RAY,
Defendant-Appellant

----------x

~~PRELIMINARY~~ STATEMENT OF FACTS

On April 23, 1965, at about 8:00 pm, defendant was driving east on 138 St. in the Bronx. He stopped for a red light He stopped for a red light behind some other cars at the intersection of St. Ann's Ave. and 138 St. After the light changed, he honked his horn because ~~the car~~ A TAXI in front of him REFUSED TO MOVE AND was blocking traffic. Patrolman Brendan Tumulty came over to the defenant's car and told him to get out. Defendant did ~~so and stated~~ AS HE WAS TOLD BUT ~~STATED~~ PROTESTED that the policeman had let the TAXI WHICH WAS BLOCKING ~~car in front of~~ TRAFFIC ~~him~~ go, but was going to give him a summons because he was a Negro. BECAUSE THE DRIVER WAS WHITE (RAY) THE OFFICER The Defendant was arrested, handcuffed and taken to the 40 th Precinct Station House, AND CHARGED WITH VIOLATING SECTION 722(2) OF THE PENAL LAW, FOR SAYING THIS ~~Defendant was arraigned before Judge Strong of the~~ Criminal Court, Bronx County on April 28, 1965 and charged with violation of Penal Law §§ 722(2) (Disorderly Conduct). Patrolman Brendan Tumulty was the complainant.

Trial was held on June 4, 1965, before the Hon. Arthur Braun, Judge of the New York Criminal Court, Bronx County. Patrolman Brendan Tumulty was the sole witness for the prosecution. Patrolman Tumulty testified that at the time and place of the arrest, that there was one other policeman present

besides himself (pg. 11), ~~there~~ ALTHOUGH there were quite a few people in the street this evening (pg. 10), ~~that~~ ONLY five or six people were standing and watching at the time defendant said he was receiving a summons because he was a Negro (pg. 10). ~~There~~ SHORTLY THEREAFTER WHEN THE DEFENDANT WAS ARRESTED there were about 20 people ~~present~~ at the time he ~~made the~~ arrested (pg. 12) and ~~that~~ they were standing around quietly, observing what was taking place (pg. 13), AND THERE WAS NO INDICATION THAT ANYONE WAS IN THE LEAST DISTURBED BY THE DISCUSSION BETWEEN THE DEFENDANT AND THE POLICE OFFICER.

At the close of the People's case, defense counsel moved to dismiss on the grounds that the People failed to establish a prima facie case. The motion was denied.

STATEMENT

I. There was no breach of the peace.

A breach of the peace is an offense well known to the common law. It is a disturbance of public order by an act of violence, or by any act likely to produce violence , or which, by causing consternation and alarm, disturbs the peace and quiet of the community. People v. Most, 171 N.Y. 423, 64 N.E. 175 (1902). See also People v. Chesnick, 302 N.Y. 58, 96 N.E.2d 87, (1950), People v. Pieri, 269 N.Y. 315, 199 N.E. 495 (1936).

The conduct charged must at least be such that a breach of the peace has become imminent or might reasonably be expected or intended to flow from such conduct. People v. Monnier, 280 N.Y. 77, 19 N.E.2d 789 (1939). See also People v. Perry, 265 N.Y. 362, 193 N.E. 175 (1934), People v. Ross 11 App. Div. 2d 1080, 206 N.Y.S.2d 471 (4th Dep't. 1960).

Where complainant is a police officer whose primary responsibility is the preservation of the public peace, he is legally incapable in that capacity to be so provoked as to himself cause a breach of the peace. People v. McMinn, 20 Misc. 2d 967, 189 N.Y.S.2d 627 (Onieda County Ct. 1959). See also People v. De Stefanis, 34 N.Y.S.2d 52 (Utica City Ct. 1942), People v. Suits, 20 Misc. 2d 627 (Schenectady County Ct. 1960).

A policeman's opinion as to a possible breach of the peace is one fact in evidence and can not be taken as conclusive. People v. Trumble, 63 N.Y.S.2d 720 (Magis. Ct. 1946).

II. Defendant's actions were not offensive to others.
See N.Y. Penal Law §§ 722(2).

III. No crowd had collected.

A crowd is a throng, a multitude, a great number of persons. People v. Kieran, 26 N.Y.S.2d 291 (Nassau County Ct. 1941).

A crowd at midnight is not a crowd at noon. A crowd in a county schoolhouse might not be a crowd in Washington Square, but there is always implied in the word numbers with reference to the hour and location. People v. Phillips, 245 N.Y. 401, 157 N.E. 508 (1927).

IV. Defendant did not cause a crowd to collect.

Collection of a crowd during a dispute with a policeman need not definitely be attributed to the actions of the defendant rather than the policeman. People v. Sternberg, 142 Misc. 602, 254 N.Y.S. 488 (Special Sessions, Appellate Part 1931).

ARGUMENT

The prosecution did not make out a prima facie case. Not only did the prosecution fail to show any breach of the peac or threat of breach of the peace but the sole prosecution witness testified that the persons who were watching the scene between himself and the defendant were doing so quietly. The presence of the second police officer makes it even more unlikely that a breach of the peace was threatened.

There was no showing at all of any violence or threat of violence resulting from acts of the defendant. Moreover, there was nothing to indicate that defendant annoyed, disturbed, interfered with, obstructed or was offensive to anyone except perhaps a police officer who is legally incapable of being provoked into a breach of the peace.

The situation in this case is clear. The defendant felt that he was being unfairly singled out for a traffic infraction and protested to the officer. If every motorist who did the same thing was arrested for his protests, the courts of of our city would have little time for any other work. Consequently, arrests for disorderly conduct must be restricted to situations where an actual breach of the peace is threatened. This fact must be established by the evidence. The opinion of the arresting officer is not enough, and can not be enough if our citizens are to be secure in their persons from arbitrary arrest.

CONCLUSION

For the above stated reasons, the judgment of the court should be reversed.

Respectfully submitted,

STEPHEN M. NAGLER
Attorney for Defendant-
Appellant

Cal. No. 595

To be argued by
ARNOLD KIDECKEL

APPELLATE TERM OF THE SUPREME COURT
FIRST JUDICIAL DEPARTMENT

- -x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JESSE RAY,

Defendant-Appellant.

- -x

RESPONDENT'S BRIEF

ISIDORE DOLLINGER
DISTRICT ATTORNEY
COUNTY OF BRONX

APPELLATE TERM OF THE SUPREME COURT
FIRST JUDICIAL DEPARTMENT

- -x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JESSE RAY,

Defendant-Appellant.

- -x

RESPONDENT'S BRIEF

STATEMENT

Defendant appeals from a judgment of theCriminal Court of the City of New York, Bronx County, rendered June 4, 1965, convicting him of violating Section 722 of the Penal Law (Disorderly Conduct), after trial before Braun, J. The Court suspended sentence.

FACTS

The defendant was driving his automobile along 138th Street in the Bronx. The defendant honked his horn

several times. This caused the officer on duty, Tumulty, to ask the defendant for his license and registration. The defendant got out of his car and shouted the following statement at the officer, "You're going to give me a summons because I am a Negro but you let that goddamn' white man go" (16).

The defendant twice refused to obey the officer's requests to get back into the car. This conduct caused a crowd to gather about (16, 18). The officer then arrested the defendant for violation of Section 722 of the Penal Law.

POINT ONE

THE DEFENDANT'S GUILT WAS ESTABLISHED BEYOND A REASONABLE DOUBT.

The defendant engages in an extensive dissertation on the law of disorderly conduct. The defendant is really trying to convince this Court that the trier of the facts should have believed the defendant and not the prosecution.

It is well established that police officers may give reasonable directions in the performance of their duties. They are called upon to determine both the occasion for and the nature of such directions. Reasonable discretion is left to the officers. (People v. Galpern, 259 N.Y. 279) In the instant case, the officer

used his discretion in asking the defendant to return to his automobile. The defendant's refusal to obey the request caused a crowd to gather. It is not ncessary for the peace to be actually broken. If the act is unjustified and unlawful, which tends to break the peace, then no more is required.

People v. Kovalchuk, 68 N.Y.S. 2d 165.

It has been held by the Court of Appeals that where a charge is made under Section 722 (2) of the Penal Law, a conviction will be affirmed if the evidence establishes a violation under any of the subdivisions of this Section.

People v. Feiner, 300 N.Y. 362.

In People v. Perry, 265 N.Y. 362, the Court declared that each case must depend upon the time, place and circumstances of the alleged disorderly conduct act.

In the final analysis, it is obvious that the prosecution's case was believed by the Trial Court. It has been repeatedly held that an appellate court should not disturb the finding of a trier of facts.

People v. Atlas, 230 N.Y. 629;
People v. Long, 206 N.Y. 693.

CONCLUSION

THE JUDGMENT SHOULD BE AFFIRMED.

Respectfully submitted,

ISIDORE DOLLINGER
District Attorney
Bronx County
Attorney for Respondent

ARNOLD KIDECKEL
Assistant District Attorney
of Counsel.

May 5, 1965

Mr. Willie Andrew Sinkfield
2020 Boston Post Road
Bronx, New York

Dear Mr. Sinkfield:

I understand that you were a passenger in the car owned by Jesse Ray on April 23rd, 1965 when Mr. Ray was arrested for disorderly conduct. The CORE Legal Department has undertaken an investigation of this matter with the view of assisting Mr. Ray in his defense. Since you are the most important witness to the events which occurred on that day it is urgent that we speak to you at your earliest possible convenience. Please call me as soon as possible at PL 2-8060. Thank you very much in advance for your immediate attention.

Very truly yours,

SMN/cs

Steven M. Nagler

May 6, 1965

Dr. Waldemar Rollins
791 E. 163rd Street
Bronx, New York

Dear Dr. Rollins:

My office is assisting Mr. Jesse Ray with the preparation of his defense to charges of disorderly conduct which arose on April 23, 1965. Mr. Ray tells me that he visited your office on April 24, 1965. He also says that you had treated him previously for back injuries arising from an accident which took place in 1963.

Your answers to the following questions would be most helpful. Were the injuries for which you treated Mr.Ray on April 24,1965 new injuries? Or, in your opinion did they arise out of the 1963 accident or some other previously existing cause known to you? Had the injuries which Mr.Ray had previously received been in any way aggravated on the last occasion which you had seen him? What was the nature of the malady about which Mr. Ray visited you on April 24, and in your opinion what was the cause? Could the injuries about which Mr.Ray visited you on April 24 have arisen from a blow of any kind?

Thank you very much for your time and attention.

Very truly yours,

SMN/cs

STEPHEN M. NAGLER

VALDEMAR W. ROLLINS, M. D.
791 EAST 163RD ST.
BRONX 56, N. Y.
TELEPHONE DA 8-5651

Steve

May 20, 1965

George Schiffer
Attorney At Law
40 East 49th Street
New York, N.Y. 10017

RE: Jesse Ray

To Whom It May Concern:

Above named patient was seen by me on April 26, 1965 complaining of pains in his neck, shoulder and back which he claims were due to a beating received while in a Police Precinct.

There was definite tenderness of his neck, right flank and back regions which were not related to the accident in 1963.

The injuries could have been caused by blows to the affected areas.

Valdemar W. Rollins, M.D.

VWR/acc

July 8, 1965

Mr. Hyman Levy
100 LaSalle Street
(Apt. 18C)
New York, N. Y.

Dear Mr. Levy:

I am the attorney of record in the case of People v. Jesse Ray tried in the Criminal Court of Bronx County on June 4, 1965 before Judge Braun. I understand that you were the court reporter. Enclosed please find a check for $47.00 for an original and five copies of the minutes of the trial.

Thank you very much for your time and attention.

Very truly yours,

Stephen M. Nagler

SMN:bb
enc.

Date: 4/30/65

/ WY 1-0921-Bx Call 777-2008

Reported by: Harold Davidson
(Bronx CORE)

JESSE
~~BILL~~ RAY, 997 UNION AVE, Bx., DA 9-9557 - Call back at 8 P.M. (FRI).

In a traffic jam on 138TH St. driving east (near St Ann's Avenue) on 4/23/65. Taxi was blocking traffic everyone was honking including him (3x).

Cop (#9081 badge) asked him for registration, Bill asked "what I do". Cop told him to get out & place hands on car, & then searched him, and handcuffed him (made comments about race etc.) Cop took him to 40TH Precinct. In station he was questioned by 1st Cop and a 2nd cop (Badge #6517). While questioning they jabbed him with billy, punched him & #6517 put a gun to his head. Questioned about his identification.

He has been to DR. VALDEMAR ROLLINS. FOR bruises on neck, arm, back & groin, Cortot prescribed for groin injury. (4/24)

Booked on Dis Con. (2nd appearance) (paroled)
Arraigned on (4/23) 4/28 at Centre St. - Prelim. Hearing - pleaded not guilty
Hearing date ~~Date set~~ for 5/11 (because he had no lawyer).

Held for over 2 hours,

Police car came up about 5 minutes later.

#6517 came over about 10 minutes late. after J. R. was handcuffed said nothing until after arriving at precinct.

Call Dr & witness, Williandrew (Sinkfield)
Rollins
4 → 3rd Ave, Bklyn.
20 20 boston Post Road
Fld Felonious assault charges as soon as possible.

Eli Cohen or
~~Saul Chrisman~~

1. Name?
2. Address? 992 Union Ave.
3. ~~Married~~? 22 May, 1943. — Children — Ages 16, 5½, 3½
4. Employed?
5. Where were you on 4/23? 9:05PM. Time? Weather?
6. What happened?
7. Ever arrested — Between 15 & 16 yrs of age
8. Character witnesses?
9. Doctor
10. Previous injury
11. Witness
12. Any accidents?
13. Church?

Call Tom Farrell at Park, Weiss. tell him facts & what we are doing:
1. Filing Complaint (after arguing charges are filed

Sketch Maps of 1. placement 2. area of arrest

Wife tried 112th & pat - 2175 x 1st Ave Basil Days (husband James) stopped about 7:30

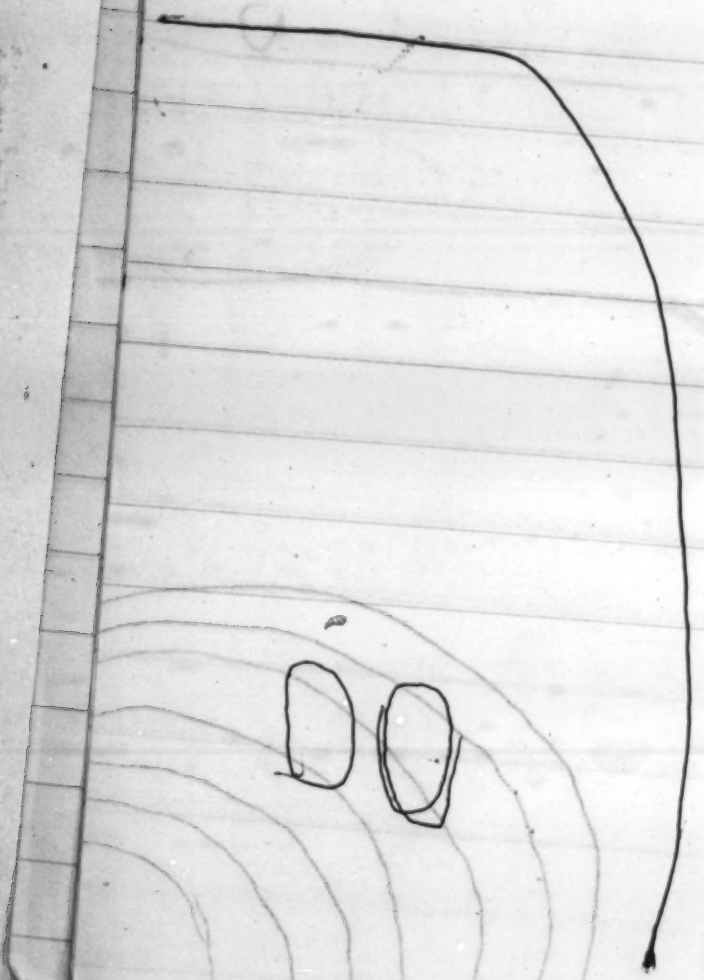
Dr Valdemar Rollins — June 1963
791 E. 163rd St.
Bx. - DA8-5651 1963 - Garage accident.
Post office 10/5/56 - 2/2/58

9/64 4/24 (Sat) - 6-8.

Rev. J. A. Polite
Thessalonia Baptist Church
951 Stebbins Ave.

Time Schedule

1. Picked up Willie Andrew Sinkfield at his job in Bklyn. ~~Navy~~ ~~do~~ at 4:00 P.M. Left place of work at 4:45 P.M.
2. Drove to bar had one beer. Friend had a double and a beer chaser. - left bar about 5:45 P.M.
3, Drove to Fulton Street where friend stopped for an beer to talk to friends. Left about 7:00 P.M.
4, Drove to 112th Street & 1st Avenue. Arrived at 7:30 P.M.
5, Drove ~~to~~ over Willis Avenue Bridge to 138th St. & St. Ann's Avenue. - Arrived at 8:05 P.M.



N

ST ANN'S Avenue

Y = JESSE RAY'S CAR
X = OFFICER 9081
Z = OFFICER # 6517
O = TRAFFIC LIGHTS
● = FIRE ALARM BOX

138TH ST

Z X

O

P.C.

CAB.

Z

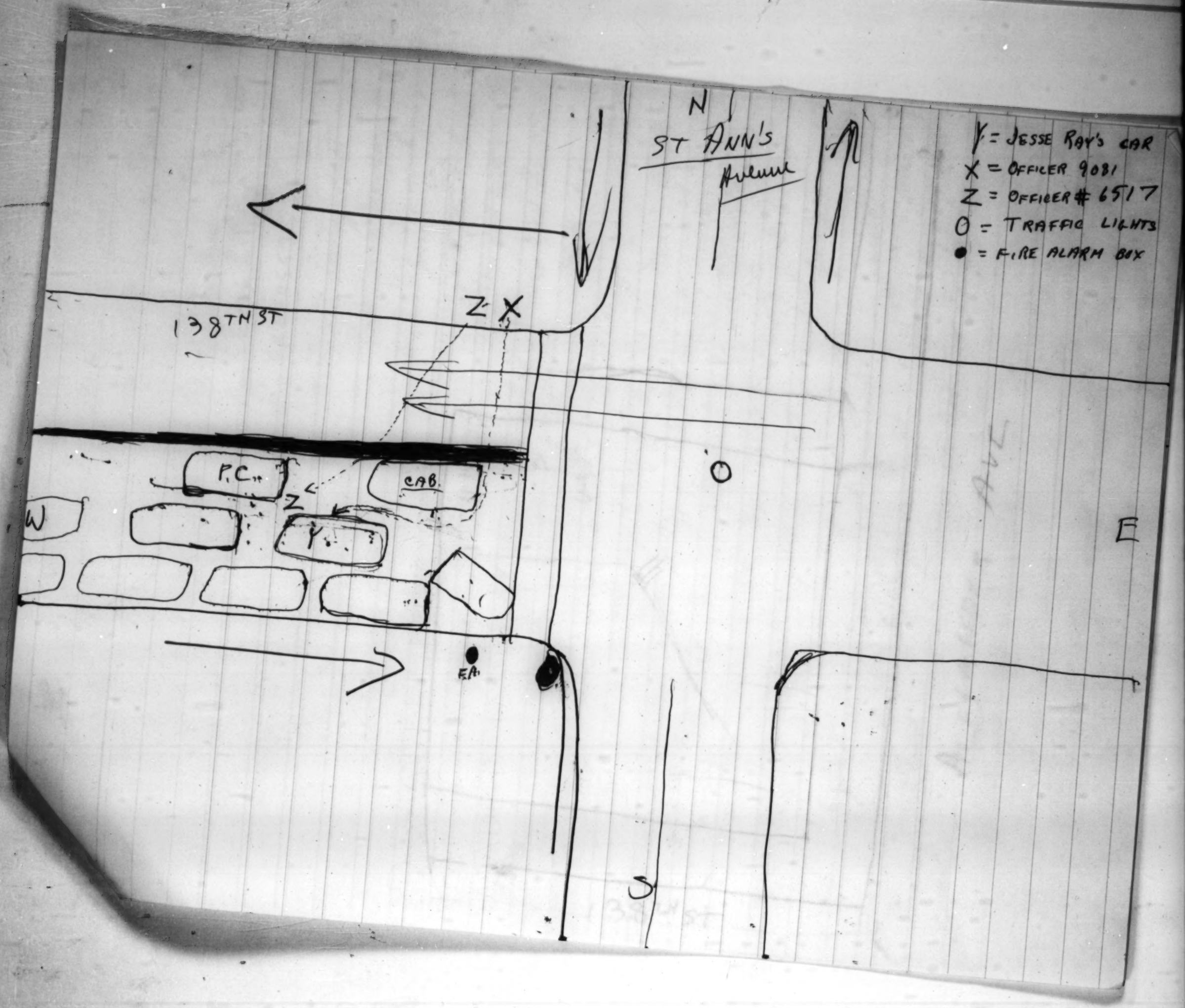
Y

W

E

F.A.

S


N
ST ANN'S
Avenue
Y = JESSE RAY'S CAR
X = OFFICER 9081
Z = OFFICER # 6517
O = TRAFFIC LIGHTS
● = FIRE ALARM BOX
138TH ST
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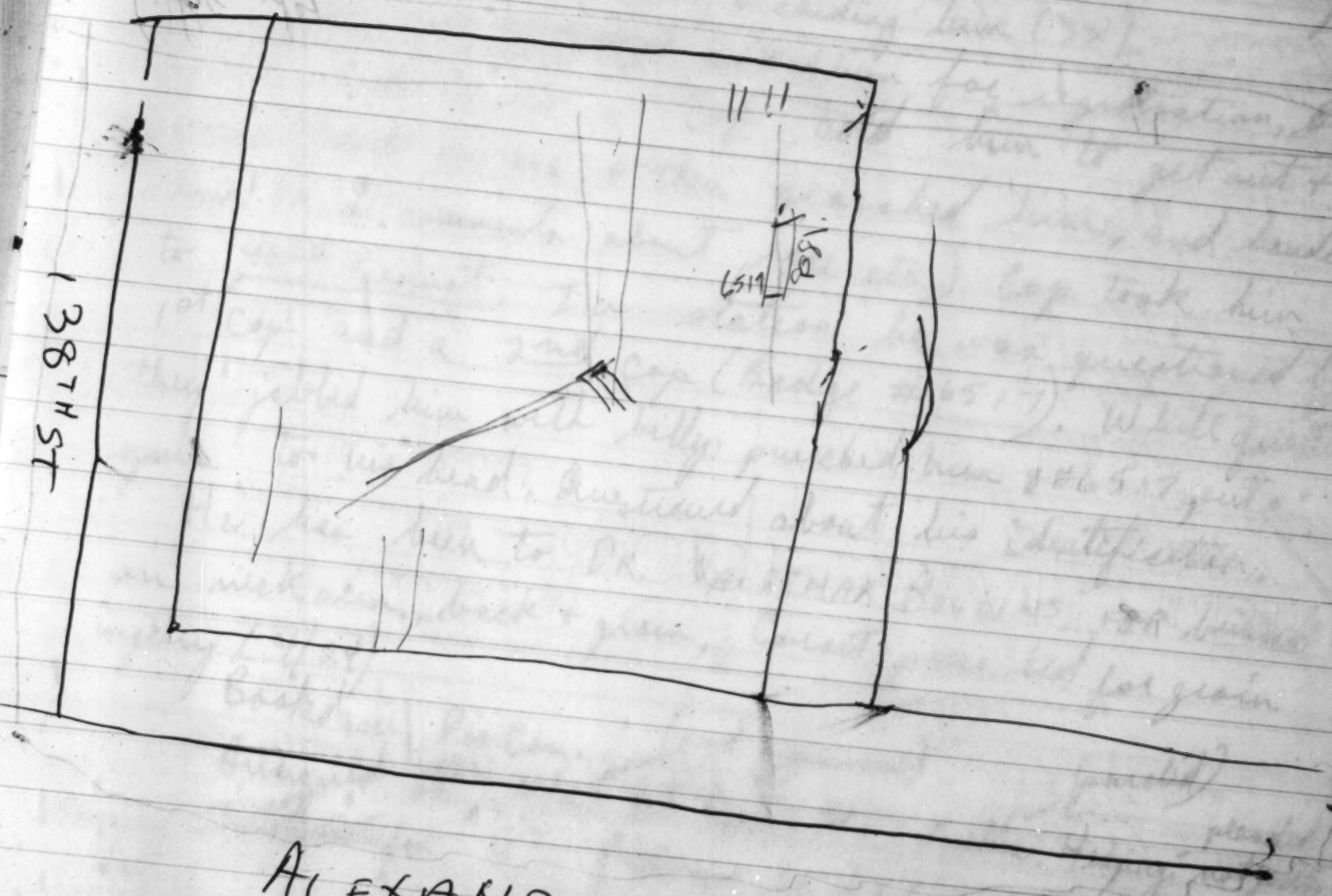
138TH ST
ALEXANDER AVE

MSS SELFRE REFERENCE - STATE OF NEW YORK V. ROBERTS, JESSE - CASE REFERENCES,
546
1963-1965

Box 41
Folder 2

State Historical Society of Wisconsin

Please Retain Original Order

CRIMINAL COURT OF THE CITY OF NEW YORK

PART 1A, BOROUGH OF THE BRONX

THE PEOPLE OF THE STATE OF NEW YORK On the complaint of DETECTIVE DRUMMOND -against- JESSE ROBERTS, Defendant	Docket #1A-5536 Charge: 3305 PHL ARRAIGNMENT

Nov. 8, 1963

B e f o r e:

HONORABLE SAMUEL J. OHRINGER,
Judge of the Court

A p p e a r a n c e s:

NATHAN ROSENBLATT, ESQ.
Assistant District Attorney
Attorney for People

JESSE ZASLAV, ESQ.
Attorney for Defendant
217 Broadway
New York, N. Y.

BRIDGEMAN: Patrick Coyle.

Louis F. Lanuto
Official Court Reporter

CRIMINAL COURT OF THE CITY OF NEW YORK

PART 1A, BOROUGH OF THE BRONX

THE PEOPLE OF THE STATE OF NEW YORK	Docket #1A-5536
On the complaint of	Charge: 3305 PHL
DETECTIVE DRUMMOND	
-against-	
JESSE ROBERTS,	
Defendant	ARRAIGNMENT

Nov. 8, 1963

B e f o r e:

HONORABLE SAMUEL J. OHRINGER,
Judge of the Court

A p p e a r a n c e s:

NATHAN ROSENBLATT, ESQ.
Assistant District Attorney
Attorney for People

JESSE ZASLAV, ESQ.
Attorney for Defendant
217 Broadway
New York, N. Y.

BRIDGEMAN: Patrick Coyle.

Louis F. Lanuto
Official Court Reporter

BRIDGEMAN: New arraignment: Docket #5536; Jesse Roberts; 3305 Public Health Law; on the complaint of Detective Drummond.

Officer, do you swear to the affidavit?

THE OFFICER: I do.

BRIDGEMAN: On November 8, at 1:00 a. m., La Fontaine Avenue, you did violate 3305 of the Public Health Law. He states that he did find in an envelope, an alleged -- to be marijuana and when he questioned, you were the owner of the said premises and stated, "All right, you got me. It's mine."

Do you represent the defendant, counseller?

MR. ZASLAV: Yes.

BRIDGEMAN: Represented by --

MR. ZASLAV: Jesse Zaslav, 217 Broadway, New York.

Your Honor please, this defendant, as your record indicates, has no previous record; he has a business in the

Bronx; he has a home that's thirty-five thousand dollars that he bought and his mother is in Court and he has a wife and children.

THE COURT: What's your application?

MR. ZASLAV: That he be paroled in his own recognisance.

THE COURT: Has a home worth thirty-five thousand dollars. Five hundred dollars bail. What date?

MR. ZASLAV: Two weeks, Friday?

THE COURT: November 20 -- 29?

THE OFFICER: How about the 29th?

MR. ZASLAV: Yes, that's good. Not good with me, Your Honor.

THE COURT: You said two weeks?

MR. ZASLAV: December 3rd, Your Honor; December 5th, Your Honor.

THE COURT: All right, December 5th; five hundred dollars bail.

BRIDGEMAN: You can make a phone call, free of charge, from the office of the warden.

- - - - -

The above is an accurate copy of the minutes in this case.

Louis F Lamb

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

----------x

PEOPLE OF THE STATE OF NEW YORK

vs.

JESSE ROBERTS,

Defendant.

----------x

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavits of JESSE ROBERTS, and JESSE ZASLAV, Esq., sworn to the day of November, 1963 and upon the arraignment, all the pleadings and proceedings had herein, the undersigned will move this Court at Part , Criminal Court, City and State of New York, at 162nd Street, Washington Avenue, on the 5th day of December, 1963 at 10 o'clock in the forenoon of that date or as soon thereafter as counsel can be heard for an order supressing the evidence obtained in the above mentioned case contrary to the constitutional rights of the defendant.

New York, New York
November 25, 1963

Yours, etc.

JESSE ZASLAV
Attorney for Defendant
Office & P.O. Address
217 Broadway
New York 7, New York

TO:- Isidore Dollinger
District Attorney
Bronx County
161st Street and Grand Concourse
Bronx, New York

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

----------x

PEOPLE OF THE STATE OF NEW YORK

vs.

JESSE ROBERTS,

Defendant.

----------x

CITY AND STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

JESSE ROBERTS, being duly sworn, deposes and says:

That your deponent is the defendant in the above entitled action and is thoroughly familiar with all the facts and circumstances of this matter.

That your deponent is making this affidavit in conjunction with a motion to suppress the evidence as illegally seized in this particular case.

The entire chain of events in this matter took place on the 7th day of November, 1963 at which time your deponent made a complaint to the 48th Precinct in the Bronx relative to your deponent's stolen car. That your deponent had specifically gone to the police station and made a report in person. Later that day, your deponent once again went to the police station at which time it was indicated by the police officers that one, Richard Warmey had taken your deponent's vehicle. At such time your deponent remained in the police station at the request of the officers who continually requested that the charges not be made on Grand

Larceny. Your deponent then returned to his place of business which was located at 2030 La Fontaine Avenue. At such time, I was confronted by the defendant in the case, Richard Warmey with another male defendant and three detectives from the 48th Squad of which one was detective, Fred Drummond. At this time I was interrogated about a radio in my possession which allegedly received police calls and bullet holes in the ceiling and a pistol which was allegedly to be in my possession. It was at such time approximately fifteen minutes after I found the police in the premises that Detective Drummond displayed an envelope to me, the contents of which contained marijuana and he indicated that he had taken the envelope of marijuana from a sand bucket on the wall. At such time, contrary to the statement of the detective, I vehemently denied the marijuana belonged to me. I at no time permitted these or any other detectives on the premises. I requested that they leave the premises but they refused. At no time during the time in the premises or previous thereto or subsequent thereto did they display a search warrant.

I was subsequently taken to the 48th Precinct at which time I was beaten to a point that required me to be hospitalized for four days. This matter is presently before the Grand Jury of this County.

WHEREFORE, your deponent respectfully requests that the evidence adduced from these illegal search and seizure and subsequent arrest be and hereby be suppressed.

JESSE ROBERTS

Sworn to before me this
day of November 1963

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

----------X

PEOPLE OF THE STATE OF NEW YORK

vs.

JESSE ROBERTS,

Defendant.

----------X

CITY AND STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

JESSE ZASLAV, being duly sworn, deposes and says:

That your deponent is the attorney for the defendant herein and is thoroughly familiar with all the facts and circumstances of this case.

The law today is personally precise in definitive beyond any interpretation of the Courts. The Supreme Court in the United States in the case of "MAPP vs. OHIO" 367 U.S. 643, definitely and without any questions of doubt has caused that any evidence adducted from an illegal search in violation of the constitutional rights of the defendant will be set aside and any evidence adduced therefrom will be disallowed and suppressed from any trial or from being brought before any Grand Jury in any State of the United States.

This defendant was arrested as a result of making a complaint to the Police Department in the 48th Precinct in the Borough of Bronx that his motor vehicle had been stolen.

A series of events was thus started whereby the defendant refused to withdraw his complaint and was subsequently arrested on his premises after what is stated to be a search of those premises without a warrant. It is very clear from the affidavit of the defendant that he denied any admission to the premises. It is also clear from the affidavit of the defendant that he made no admission and it is also very evident that no search warrant had been issued to any member of the police department to make a search of these premises.

The cases in this State are now replete withaa reaffirmation of the law as stated in"Mapp vs. Ohio". In a decision decided by the Hon. Justice Shapiro decided on February 15, 1962 in the case of "People vs. Brown" at the County Court, Queens County his Honor said " Ours is not a police state. We are a government of laws and not of men. The trained nose of a gendarme is not an adequate substitute for the United States Constitution".

Your deponent feels that it is the tenure of the feelings of the Appellate Division and Court of Appeals of the State of New York at the present time.

WHEREFORE, your deponent respectfully prays that the evidence adduced as a result of the illegal search and seizure of this case be suppressed and the case under the circumstances be dismissed.

JESSE ZASLAV

Sworn to before me this
day of November, 1963.

CRIMINAL COURT OF THE CITY OF NEW YORK
PART 2 B, BOROUGH OF THE BRONX

THE PEOPLE OF THE STATE OF NEW YORK,
On the Complaint of
DET. FREDERICK DRUMMOND,

Plaintiff,

-against-

JESSE ROBERTS,

Defendant

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that the defendant herein, Jesse Roberts, appeals to the Appellate Term of the Supreme Court of the State of New York held in and for the First Judicial Department from a judgment convicting him of violation of Section 3305 of the Public Health Law of the State of New York by the Honorable J. Howard Rossbach, Honorable Nicholas F. Delagi and Honorable Ambrose Haddock, on the 17th day of January, 1964, and from the sentence imposed therein by the Honorable John B. Lee and the Honorable Neil P. Bottiglieri on the 31st day of January, 1964, sentencing the defendant to an indefinite term in the penitentiary, and from each and every part thereof.

Dated: New York, N. Y.
February 28, 1964

Yours, etc.
CARL RACHLIN,
Attorney for the Defendant
Office and P.O. Address
165 West 46th Street
New York, N. Y. 10036

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, BRONX COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

On the Complaint of

DET. FREDERICK DRUMMOND,

Plaintiff-Respondents,

-against-

JESSE ROBERTS,

Defendant-Appellant.

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of SHELDON ENGELHARD, sworn to the 23rd day of December, 1964 and upon all the proceedings heretofore had herein, a motion will be made to this Court, at the Supreme Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 8th day of January, 1965 at 10:00 in the forenoon of that day or as soon thereafter as counsel can be hear for an Order:

1) Vacating the Order of this Court dated July 6. 1964;

2) Directing that the appeal herein be restored and processed; and

3) For such and other relief as to this Court may deem just and proper in the premises.

Dated: New York, New York
December 23, 1964.

Yours, etc.

CARL RACHLIN, Attorney
for the Defendant-Appellant

TO: HON. ISIDORE DOLLINGER
District Attorney, Bronx County
851 Grand Concourse
Bronx, New York

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, BRONX COUNTY

- -X

THE PEOPLE OF THE STATE OF NEW YORK :

On the Compàaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents, :

-against- :

JESSE ROBERTS, :

Defendant-Appellant. :

- -X

STATE OF NEW YORK)
COUNTY OF NEW YOHK) ss.

SHELDON ENGELHARD being duly sworn deposes and says:

I am associated with the law firm of Vladeck, Elias, Frankle & Vadeck and with Carl Rachlin the attorney of record in this appeal.

I was assigned to handle this appeal just prior= to the date when the time in which to file a Notice of Appeal would have expired; our offices were not involved in the trial.

This appeal was dismissed by Order of this Court on July 6, 1964 under its Rule III.

For the following reasons we respectfully request that that Order be vacated and that the appeal be processed.

The defendant-appellant (hereinafter called "Defendant") was charged with violating Section 3305 of the New York State Public Health Law, possession of a narcotic drug. The defendant was found guilty of the charge by the Hon. J. Howard Rossbach (presiding), Hon. Ambrose J. Haddock and Hon. Nicholas F. Delagi. On January 31, 1964 the defendant was sentenced by Hon. John B. Lee and Hon. Neil Bottiglieri to an indefinite term in the penitentiary, which sentence was suspended.

At his trial the defendant testified he had never been convicted of a crime or in trouble prior to the underlying charge herein. He only seeks to vindicate himself with this appeal. He denied and continues to deny any guilt herein at all.

Without regard to the question of the innocence or guilt of the defendant, under recent decisions of the Supreme Court of the United States and of the Courts of the State of New York the defendant was deprived of his fundamental constitutional rights in that:

1. Upon being suspect of having committed a crime the defendant should have been, but was not advised of his fundamental fight to counsel at every stage of the proceeding thereafter. Had the defendant been so advised it is doubtful whether he would have made, as is charged, statements, allegedly spoken to several of the witnesses for the People, as to the possession of narcotics with which he is charged.

2. That the sole evidence used to convict the defendant was secured by an illegal search of the defendant's premises and illegal seizure of narcotics allegedly therein; that is, without a warrant authorizing such search and seizure. This is relevant especially in light of the fact that when a search of defendant's premises was being made, he, the defendant, was in the 48th Precinct House in the Bronx. Certainly with the defendant at the Precinct House there was no excuse for the police not to have procurred a search warrant.

The incredible story that was related at the trial not only raises serious doubts as to the guilt or innocence of the defendant but also reveals the suspicous manner in which the evidence was secured, again, violating defendant's constitutional rights.

According to the testimony of Detective Frederick Drummond, 48th Squad, one of the arresting officers, the

defendant arrived at the Squad House on November 7, 1963 at about 6:00 p.m. to report that his automobile had been stolen. At that time he accused two younsters of the theft, Richard Warme, and another by the name of Rungo. Detective Drummond testified that he and Detective Kilroy knew one of the boys by name and left word at the boys' hangout that they were to come down to the police station. Significantly, on cross examination Detective Drummond said he did not know the boys personally but that Detective Kilroy knew one of them by name. This is in conflict to the testimony of Detective Kilroy who stated he knew both boys. On the other hand Richard Warme testified that while he knew Detective Kilroy by sight he never spoke to him prior to November 7, 1963.

At no time, according to the testimony, was the theft reported on a general alarm nor was there testimony that an active search for the automobile or the boys had taken place.

Detective Drummond testified that the two boys voluntarily came to the station house at about 11:00 p.m. on November 7, 1963. Shortly thereafter the defendant was picked up by the police at his Auto Body shop so that he could identify the boys. When the accused boys were confronted by the defendant they allegedly stated that the defendant had a police radio, marijuana, two 32-caliber pistols and a box of ammunition at his Auto Body shop.

According to the People's witnesses the defendant not only invited the Detectives to his shop for the purpose of inspecting it but even admitted that the marijuana, when found, belonged to him. It should be noted that neither of the boys accused of the theft were brought to defendant's Auto Body shop to point out to the Detectives where the marijuana, police radio, etc. were hidden; nor was the

defendant charged with the possession of these items. Did they in fact exist?

Richard Warme said he worked for the defendant, which defendant denies, but has no independent proof of that fact. He stated he was attending Junior High School 118; he later admitted he wasn't attending any school but in fact had quit when he was 16 years old.

Warme said he was asked at about 3:00 p.m. to go on an errand by the defendant and with permission used defendant's car. Instead of merely tending to the errand he went to see a friend in the Pelham Bay area. He stayed at the friend's place for about two or three hours and then discovered that the car wouldn't start. He allegedly called the defendant several times without success. When he got back he said he went to the shop and there being nobody around he "went upstairs". Where was the car? Was it found? There was no testimony at the trial as to this by the People. The only plausible explanation lies with the defendant.

The defendant testified that he called the police to report that his car was missing. At the direction of an officer at the station house he was told to report it in person, which he did. When he was picked up by the police to identify the boys his car was outside the station house. While the defendant was inside one of the boys was taken out allegedly to look for the keys of the stolen automobile which he supposedly tried to throw away. After waiting a period of time and nothing happening the defendant left the station house and went back to his shop. On the way back the defendant met a neighbor, Jose Torres, who said the shop was open and three officers, in addition to Warme, were inside; this is corroberated by Mr. Torres.

The defendant further testified that the issue of marijuana was brought up after one of the officers, present at his shop, asked if he, defendant, would drop the charges

against the boys; this defendant refused to do.

Jose Torres testified that he saw defendant at about 1:00 p.m. on November 8, 1963 walking toward the auto shop. He fixed the time by stating it was when the "late show" on television was over; he went to move his car to the other side of the street from where it was parked. It was at this time he told defendant that there were lights on at defendant's shop and there were people inside at the time.

Richard Warme, in addition to raising more questions then he answered with respect to the joyride he admitted he took with defendant's auto stated on more than one occasion at the trial that he doesn't like the defendant.

Moreover, what would seem to be gratuitous, except after a reading of all the testimony, is what the presiding justice at the trial stated:

"All right, by a unanimous court I'm sorry for the defendant to say that he is found guilty" (emphasis added).

The delay in prosecuting the appeal, subsequent to filing Notice Of Appeal, was due to circumstances unintentional, unavoidable and unforeseeable at the time when I was assigned to the case, that is, inasmuch as a senior partner in our firm, Stephen C. Vladeck, had to undergo two major optical operations it was necessary for me to assume a large portion of his duties for a period of many months; this was also true for the other attorneys in our office. It is not my habit or the habit of my office to engage in dilatory procedural tactics but rather to handle matters as expeditiously as possible maintaining and protecting, of course, the interests of our clients.

With the summer vacations both for the attorneys and for the secretarial staff, both of whom usually follow the Law Journal, the notice that this appeal was to be

against the boys; this defendant refused to do.

Jose Torres testified that he saw defendant at about 1:00 p.m. on November 8, 1963 walking toward the auto shop. He fixed the time by stating it was when the "late show" on television was over; he went to move his car to the other side of the street from where it was parked. It was at this time he told defendant that there were lights on at defendant's shop and there were people inside at the time.

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"All right, by a unanimous court I'm sorry for the defendant to say that he is found guilty" (emphasis added).

The delay in prosecuting the appeal, subsequent to filing Notice Of Appeal, was due to circumstances unintentional, unavoidable and unforeseeable at the time when I was assigned to the case, that is, inasmuch as a senior partner in our firm, Stephen C. Vladeck, had to undergo two major optical operations it was necessary for me to assume a large portion of his duties for a period of many months; this was also true for the other attorneys in our office. It is not my habit or the habit of my office to engage in dilatory procedural tactics but rather to handle matters as expeditiously as possible maintaining and protecting, of course, the interests of our clients.

With the summer vacations both for the attorneys and for the secretarial staff, both of whom usually follow the Law Journal, the notice that this appeal was to be

dismissed by this Court on its own motion went by undetected.

In the only other Appellate Term case which I have personally handled, in the Second Department, without having the additional burdens that arose at the time of this appeal, our papers, subject to the availability of the minutes, were filed in a timely fashion. Moreover, while I was ready to argue that appeal in an early fall term of that Court and actually having expected to do do I consented to two adjournments requested by the District Attorney's office because of their overload at that time. While I cannot rely upon that circumstance to be an excuse here I ask only once for similar consideration.

I believe that our reasons set forth for this motion are not perfunctory and that based upon the law applicable and the testimony elicited at the trial the defendant's rights should not be prejudiced by the unforeseeable events that occurred in my office. I now have in my possession the minutes of the trial and, except for the minutes of the defendant's arraignment and sentencing, I am prepared to comply with all the requirements of the Rules of the Court forthwith.

WHEREFORE it is respectfully requested that the Order dismissing this appeal be vacated.

S/ SHELDON ENGELHARD
SHELDON ENGELHARD

Sworn to before me this
24th day of December, 1964.

S/ CAROL RUBIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-5585845
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 19 6

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, BRONX COUNTY

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents :

-against- :

JESSE ROBERTS, :

Defendant-Appellant :

S I R S:

PLEASE TAKE NOTICE that the appeal in the above entitled action will be brought on for argument before the Appellate Term of the Supreme Court, County of the Bronx, at the Courthouse thereof, located at 60 Centre Street, Foley Square, County of New York on the first day of March, 1965 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: February 8, 1965.

Yours, etc.

CARL RACHLIN
Attorney for Defendant-Appellant
Office & P.O. Address
165 West 46th Street
New York, N.Y. 10036

TO: HON. RICHARD R. BIEBER
Clerk of the Appellate Term

HON. ISIDORE DOLLINGER
District Attorney of Bronx County

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, BRONX COUNTY

----------X

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents, :

-against- :

JESSE ROBERTS, :

Defendant-Appellant. :

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It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the appellant's time to perfect the above appeal be extended to the April 1965 term of this Court.

Dated: February 17, 1965

S/ Isidore Dollinger

ISIDORE DOLLINGER
District Attorney, Bronx County

Carl Rachlin

CARL RACHLIN
Attorney for Defendant-Appellant

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, BRONX COUNTY

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents, :

-against- :

JESSE ROBERTS, :

Defendant-Appellant. :

SHELDON ENGELHARD, being duly sworn deposes and says:

I am associated with Carl Rachlin, the attorney of record in this appeal.

This appeal was dismissed by Order of this Court on July 6, 1964 under its Rule III.

A motion was made during the January 1965 term of this Court to vacate its Order of July 6, 1964; that Order was vacated by the January 1965 term and the defendant was directed to perfect the appeal for the March 1965 term of this Court. The defendant was sentenced to an indeterminate sentence; that sentence was suspended.

As of today, February 16, 1965, we have been unable through normal channels to secure certified copies of the complaint and copies of the defendant's fingerprint record. I communicated with the official court reporter as to these items and was assured that our office would have them in time to perfect the appeal. As a matter of fact, the same stenographer first complied with our order of the minutes of the defendant's sentencing today.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, BRONX COUNTY

----------X

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents, :

-against- :

JESSE ROBERTS, :

Defendant-Appellant. :

----------X

SHELDON ENGELHARD, being duly sworn deposes and says;

I am submitting this affidavit to supplement my affidavit sworn to February 16, 1965 which was filed with this Court on February 17, 1965.

The purpose of the aforementioned affidavit which had been annexed to a stipulation entered into between the attorneys for the respective parties to this appeal was to extend the time to perfect the appeal until the April 1965 term of this Court.

The Notice of Appeal was served upon the District Attorney of the County of the Bronx February 28th, 1964.

That Notice of Appeal with an admission of service by the aforementioned office of the District Attorney was filed with the Clerk of the Criminal Court of the City of New York on February 28, 1964.

Inasmuch as the defendant-appellant's sentence, to be committed to an indeterminate term in the New York

City penitentiary, was suspended no certificate of Reasonable Doubt was sought.

Except as noted below no request for an extension of time to perfect this appeal has been made prior hereto.

By Order of this Court under its Rule III the appeal was dismissed on July 6, 1964 for failure to perfect the same.

A motion returnable on January 8, 1965 for an Order vacating the Court's Order of July 6, 1964 and to permit the restoration of the appeal was granted by the January 1965 term of this Court; noted on January 15, 1965 in the New York Law Journal.

Sworn to before me this
day of February, 1965.

CAROL RUBIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-3388845
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 19[illegible]

s/ Sheldon Engelhard
SHELDON ENGELHARD

City penitentiary, was suspended no certificate of Reasonable Doubt was sought.

Except as noted below no request for an extension of time to perfect this appeal has been made prior hereto.

By Order of this Court under its Rule III the appeal was dismissed on July 6, 1964 for failure to perfect the same.

A motion returnable on January 8, 1965 for an Order vacating the Court's Order of July 6, 1964 and to permit the restoration of the appeal was granted by the January 1965 term of this Court; noted on January 15, 1965 in the New York Law Journal.

Sworn to before me this
day of February, 1965.

CAROL RUBIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-3388845
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 19[illegible]

S/ Sheldon ENGELHARD
SHELDON ENGELHARD

City penitentiary, was suspended no certificate of Reasonable Doubt was sought.

Except as noted below no request for an extension of time to perfect this appeal has been made prior hereto.

By Order of this Court under its Rule III the appeal was dismissed on July 6, 1964 for failure to perfect the same.

A motion returnable on January 8, 1965 for an Order vacating the Court's Order of July 6, 1964 and to permit the restoration of the appeal was granted by the January 1965 term of this Court; noted on January 15, 1965 in the New York Law Journal.

Sworn to before me this
day of February, 1965.

CAROL RUBIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-3388845
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 19[illegible]

S/ Sheldon ENGELHARD
SHELDON ENGELHARD

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK :
On the Complaint of :
DET. FREDERICK DRUMMOND, :
Plaintiff-Respondents, :
-against- :
JESSE ROBERTS, :
Defendant-Appellant. :

The Notice of Appeal in the above captioned matter was served upon the District Attorney of the County pf the Bronx on February 28, 1964.

The Notice of Appeal, with admission of service by the District Attorney, of the County of the Bronx was filed with the Clerk of the Criminal Court of the City of New York on February 28, 1964.

Except as noted below only one prior extension of time tp perfect this appeal had been made; as noted in the New York Law Journal on February 23, 1965, the defendant-appellant was granted permission to perfect his appeal for the April 1965 Term of this Court.

Inasmuch as the defendant-appellant's sentence of an indeterminate term in the New York City penitentiary was suspended no Certificate of Reasonable Doubt was sought. Similarly no request for bail pending this appeal was necessary.

This appeal was dismissed by Order of this Court on July 6, 1964 under its Rule III. A motion was made during the January 1965 Term of this Court to vacate its

Order of July 6, 1964; that Order was vacated by the January 1965 Term as noted in the New York Law Journal on January 15, 1965.

WHEREFORE, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the defendant-appellant's time to perfect the above appeal be extended to the May 1965 Term of this Court.

Dated: March , 1965

ISIDORE DOLLINGER
District Attorney, Bronx County

CARL RACHLIN
Attorney for Defendant-Appellant

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, BRONX COUNTY

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents, :

-against- :

JESSE ROBERTS, :

Defendant-Appellant. :

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the appellant's time to perfect the above appeal be extended to the May 1965 Term of this Court.

Dated: March , 1965

ISIDORE DOLLINGER
District Attorney, Bronx County

CARL RACHLIN
Attorney for Defendant-Appellant

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, BRONX COUNTY

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents, :

-against- :

JESSE ROBERTS, :

Defendant-Appelant. :

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

SHELDON ENGELHARD, being duly sworn, deposes and says:

I am associated with CARL RACHLIN, the attorney of record in this Appeal.

This Appeal was dismissed by Order of this Court on July 6, 1964, under its Rule III.

A motion was made during the January 1965 Term of the Court to vacate its Order of July 6, 1964; that Order was vacated by the January 1965 Term and the defendant was directed to perfect the Appeal for the March 1965 Term of this Court.

As late as February 16, 1965, I attempted through normal channels to secure certified copies of the Complaint and of the defendant's fingerprint record. Having been unable to secure the same, the District Attorney, Bronx County, consented, with the Court's approval, to extend the time in which to perfect the Appeal for the April 1965 Term.

The defendant was sentenced to an indeterminate sentance which was suspended. A Notice of Appeal was served upon the District Attorney of the County of the Bronx, February 28, 1964. That Notice of Appeal with an admission of service from the office of the District Attorney was filed with the Clerk of the Criminal Court of the City of New York on February 28, 1964. Except as already noted, no request for an extension of time to perfect this Appeal has been made prior hereto.

In discussing the Appeal with a Clerk in the Office of Appeal Term and with a gentleman in the office of the District Attorney, Bronx County, it was suggested that I should include in the record the minutes of a motion to suppress certain evidence. Initially, we did not think it necessary to supply those minutes since that motion was renewed and argued during the trial of the defendant.

Shortly after the Stipulation extending the time to perfect this Appeal was So Ordered, I wrote a Special Delivery letter to the court reporter, HERBERT E. MOOREHEAD, who was to have recorded the minutes on the aforementioned motion (the certified copy of the complaint indicates that Mr. Moorehead was the official reporter during the motion). Not receiving a response from Mr. Moorehead, I again communicated by letter, but without success. I thereupon attempted to call him at his home but found that his telephone line was temporarily disconnected. After inquiring at the Stenographers office, at 100 Centre Street, Manhattan, I was told that Mr. Moorehead had been out of the office for a substantial period of time inasmuch as his mother was gravely

ill. Upon information and belief, Mr. Moorehead's mother did pass away on March 5, 1965. After repeated telephone calls were made to his home, it was not until the afternoon of March 12th that I was able to reach Mr. Moorehead. I explained my problem and the necessity of having those minutes; he assured me that he would deliver them personally by Thursday, March 18, 1965. Those minutes were not delivered on March 18th. On March 19th I communicated by telephone with Mr. Moorehead, who informed me that his typewriter had been broken and that the minutes were being typed that day on another machine; that they would be delivered when completed. In discussing the minutes with him, I found that he was typing the minutes merely of an adjournment and not the minutes of a motion to suppress evidence. After checking his file he said that he was not even sitting in that part of the Court where the motion had taken place.

Presently, I am trying to determine, despite what is indicated on the certified copy of the complaint who actually reported the minutes on the aforementioned motion. It should be noted that I served the minutes of the trial, the arraignment and the sentencing together with our brief on the District Attorney, Bronx County, February 16, 1965.

WHEREFORE it is respectfully requested that in order to comply with all the Rules of this Court andoother applicable rules and upon the annexed Stipulation and copy of the certified copy of the Complaint, this Appeal be put over to the May, 1965, Term of the Court.

SHELDON ENGELHARD

Sworn to before me this
23rd of March, 1965.

CAROL RUBIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-3388845
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1967

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, BRONX COUNTY

THE PEOPLE OF THE STATE OF NEW YORK :
On the Complaint of :
DET. FREDERICK DRUMMOND, :
:
Plaintiff-Respondents, :
-against- :
JESSE ROBERTS, : **AFFIDAVIT**
:
Defendant-Appellant. :

STATE OF NEW YORK)
) s.s.:
COUNTY OF)

HERBERT E. MOOREHEAD, being duly sworn, deposes and says:

I am a Court Reporter employed in the Criminal Courts of the City of New York. On the certified copy of the Complaint in this matter I am listed as a Court Reporter in Part 2A of the Criminal Court of the City of New York, County of the Bronx, on December 5th, 1963. That document indicates that I was the official Reporter at the hearing of the Motion to Suppress Evidence. In fact, however, I was not the Reporter sitting in that part of the Court on that day.

MR. SHELDON ENGELHARD, associated with CARL RACHLIN, the attorney on this Appeal, communicated to me by Special Delivery letter on February 24th, 1965. Mr. Engelhard sought the Minutes of the Motion to Suppress Evidence taken December 5th, 1963. He explained in that letter that he needed the Minutes promptly in order that he may perfect the Appeal for the April Term of the Appellate Term. Mr. Engelhard

again communicated with me on March 4th, 1965, by letter, again seeking the same Minutes, explaining the necessity of prompt compliance.

Inasmuch as my mother was seriously ill in the latter part of February, I took time off from my job beginning February 23rd; and I will not report back to work until March 22nd, 1965. In the interim, on March 5th, 1965 my mother passed away. Just prior to her passing and subsequent thereto, I was not at my apartment and was not aware of the communications that have been sent to me. Moreover, my telephone was temporarily disconnected; Mr. Engelhard indicated that he attempted to call at my home on several occasions.

On March 12th, Mr. Engelhard spoke to me on the telephone indicating the necessity of the Minutes. I promised to send them to him by Thursday, March 18th, 1965. However, inasmuch as my typewriter broke down I could not have the Minutes prepared until Friday, March 19th. On the morning of March 19th, Mr. Engelhard called by telephone urging that the Minutes be delivered to him. In the course of the conversation, we discovered that the Minutes that he wanted were not available through myself; I was preparing Minutes merely of an Adjournment.

Sworn to before me this

day of March, 1965.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

- -X

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET.FREDERICK DRUMMOND, :

Plaintiff-Respondents :

-against- :

JESSE ROBERTS, :

Defendant-Appellant :

- -X

S I R S:

PLEASE TAKE NOTICE that the appeal in the above entitled action will be brought on for argument before the Appellate Term of the Supreme Court, First Department, at the Courthouse thereof, located at 60 Centre Street, Foley Square, County of New York on the 3rd day of May, 1965 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: April 14, 1965.

Yours, etc.

CARL RACHLIN
Attorney for Defendant-Appellant
Office & P.O. Address
165 West 46th Street
New York, N.Y. 10036

TO: HON. RICHARD R. BIEBER
Clerk of the Appellate Term

HON. ISIDORE DOLLINGER
District Attorney of Bronx County

94 98540.62 (C.S.)

At an Appellate Term of the Supreme Court, First Department, held at the County Court House, Borough of Manhattan, City of New York, on the 20th *day of* MAY *1965*

Present:—Hon. LOUIS J. CAPOZZOLI, J.P.

" " SAMUEL H. HOFSTADTER,

" " WILLIAM C. HECHT, JR., *Justices*

FILED
MAY 20 1965
APPELLATE TERM

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

vs.

JESSE ROBERTS,
Defendant-Appellant

May No. 245

An appeal having been taken to this Court by Jesse Roberts the defendant-appellant, from a judgment of conviction by Hons. Rossbach, Haddock and Delagi, Judges of the New York City Criminal Court, upon the charge of violating § 3305 of the Public Health Law, entered on the 17th day of January, 1964, and said defendant-appellant having been sentenced by Hons. Bottiglieri, Lee and Bloom, Judges of said Court on the 31st day of January, 1964 as follows:

New York City Penitentiary, execution of sentence suspended

and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from be and the same is hereby affirmed.

Enter

Justice Appellate Term
Supreme Court, First Department

(183)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, BRONX COUNTY FIRST DEPT

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THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents :

=against= :

JESSE ROBERTS, :

Defendant-Appellant :

----------X

RECEIVED
1965 FEB 16 PM 2:15
DISTRICT ATTORNEY
BRONX COUNTY

S I R S:

PLEASE TAKE NOTICE that the appeal in the above entitled action will be brought on for argument before the Appellate Term of the Supreme Court, County of the Bronx, at the Courthouse thereof, located at 60 Centre ~~Street~~ 3rd Street, Foley Square, County of New York on the first day of ~~March~~ May, 1965 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: ~~February~~ April 14, 1965.

Yours, etc.

CARL RACHLIN
Attorney for Defendant-Appellant
Office & P.O. Address
165 West 46th Street
New York, N.Y. 10036

TO: HON. RICHARD R. BIEBER
Clerk of the Appellate Term

HON. ISIDORE DOLLINGER
District Attorney of Bronx County

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, BRONX COUNTY

----------X

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents :

-against- :

JESSE ROBERTS, :

Defendant-Appellant :

----------X

DEFENDANT'S BRIEF

STATEMENT

This is an appeal by the defendant, Jesse Roberts, from a conviction finding him guilty of violating Public Health Law Section 3305, and sentencing him to an indefinite term in the penitentiary; that sentence was suspended.

The defendant, Jesse Roberts, was arrested on November 8, 1963 for allegedly violating Public Health Law Section 3305. He was accused of having in his possession an envelope containing marijuana. (A-p.2)[1]

[1] "A" refers to page of minutes at defendant's arraignment on November 8, 1963.

That Section provides as follows:

> "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this article."

The defendant was arraigned in the Criminal Court of the City of New York, Borough of The Bronx, Part 1A, on November 8, 1963 before Hon. Samuel J. Ohringer. Bail was set at five hundred ($500.00) dollars. (A-p.3)

At the trial in the Criminal Court of the City of New York, Borough of the Bronx, on January 17, 1964, before Hon. J. Howard Rossbach, Presiding Justice, and Hon. Ambrose J. Haddock and Hon. Nicholas F. Delagi, Associate Justices, the defendant was found guilty of violating Public Health Law Section 3305, (T2-p.56).[2] No opinion was rendered. No application for a Certificate of Reasonable Doubt was made. Mr. Roberts was sentenced in the Criminal Court of the City of New York, Part 2B, Borough of The Bronx, on January 31, 1964 by Hon. Neal P. Bottiglieri, Hon. John B. Lee and Hon. Max Bloom (S-p.4)[3]

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[2] "T2" refers to minutes at defendant's trial on January 17, 1964.

[3] "S" refers to minutes at defendant's sentencing.

FACTS

The defendant, Jesse Roberts, testified that he operated an auto body repair shop for about 8 years at 2030 La Fontaine Avenue, Bronx, New York (T1-p.40).[4]

The defendant, denying his guilt further testified; that he was never arrested or ever convicted of a crime; that he never smoked nor owned marijuana; that he is married and has three children, and has been a responsible business man. (T1-p.44)

During the afternoon of November 7, 1963, at about 4:30 p.m. or 5:00 pm. the defendant reported via telephone to the 48th Police Precinct that his automobile had been stolen (T1-p.40 p. 55). He was directed to make the report in person and did so at the Bathgate Station prior to 6:00 p.m. (T1-p.41, p.55).

After making the report the defendant advised an officer that if the car were found he would be at his shop (T1-p.41); not having transportation home he would just go back to his shop and work (T1-p.41).

Two police officers, prior to midnight on November 7, 1963, came to defendant's shop and reported

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[4] "T1" refers to minutes at defendant's trial on January 16, 1964.

that his automobile was found and asked him to accompany them to the station house to identify the thieves (T1-p.41); defendant went to the station house in the officer's car (T1-p.41). The alleged thieves were two boys, Richard Warme and another boy by the name of Rungo. The officers spoke to the boys and then took one out of the "cage" and left the station house (T1-p.42).

After some time had elapsed the defendant inquired of the desk officer as to what was happening. The defendant was told that one of the alleged thieves threw away the keys to the car and the police officers and the boy were trying to find them (T1-p.42,p.54).

About 1:00 a.m., November 8, 1963, the defendant, apparently over the protest of the desk officer, said he was going back to his shop (T1-p.43). On the way back, approximately five minutes from the station house, Roberts met on the street a neighbor who said that Roberts' shop was open (T1-p.43); this was corroborated by the neighbor, José Torres (T2-p.12).

As Roberts approached the open shop, he saw three detectives and the boy identified earlier as alleged thief Richard Warme; he inquired as to what was going on

and asked the intruders to leave (T1-p.43).

One of the detectives at or near the door said "Hey, Jess, what's this we have here", referring to an envelope which the People contend contained marijuana (T1-p.43,p.51); Roberts did not see the police officers take the envelope from the hanging sand pail as alleged by the officers (T1-p.51). At that point the defendant was placed under arrest (T1-p.44).

Significantly, the police officers told the defendant that if Roberts would not press the auto theft charges then the possession of narcotics charge against him would likewise be dropped (T1-p.45,p.51); the defendant refused to drop the charges (T1-p.51).

Furthermore, contrary to the story of the police officers, the defendant never accompanied the officers back to his shop for the purpose of having it searched (T1-p.45), as the testimony of Torres shows (T2-p.12).

The defendant testified; that he knew Richard Warme, one of the alleged thieves, for about 6 or 7 years prior to the car theft; that he didn't think the youth was old enough to drive an automobile and therefore never permitted him to use his automobile or tow truck; that Warme would frequently hang around his auto repair shop

when he was apparently playing hooky from school or when he stayed away from home; that occasionally he would ask Warme to pick up cigarettes or soda pop from a store around the corner: that Warme was never an employee of the defendant (T1-p.48,p.50).

The People's witnesses relate a sequence of events which we believe are contrary to truth and is no more than incredible but nevertheless corroborate some of the important facts, but do not explain truthfully why after the alleged car thieves were found the police went to Roberts' shop.

Detective Drummond testified that on November 7, 1963 at about 6:00 p.m. the defendant made a complaint about his automobile being stolen naming Richard Warme and Rungo as those probably responsible for the theft (T1-p.6). The witness stated that he and Det. Kilroy left word at "the poolroom, bowling alley, luncheonettes," which were frequented by the boys, that the detectives wanted to see them (T1-p.6). At about 11:00 pm. the boys arrived at the police station and stated to Det. Drummond that they had not stolen the automobile, rather, that Jesse Roberts lent it to them. (T1-p.6,p.7) The defendant was then picked up at his shop by two detectives and brought to

the station (T1-p.7). The boys, after denying the charges then told the detectives that the defendant had at his shop a police radio, maraijuana, two 32-caliber pistols and a box of ammunition (T1-p.7). At that point the defendant allegedly denied the accusations but invited the detectives to search the premises, which they did (T1-p.8). At the defendant's shop, the door of which was supposedly opened by Roberts, and in defendant's presence, the witness stated he found a bag of maraijuana in a sand bucket which was suspended from a hook on a wall (T1-p.9). The defendant allegedly then said; (T1-p.9)

> "It's mine. You got me. Please leave my four hundred dollar radio in the shop; do not take the radio."

Significantly no "gun" or "ammunition" were ever found since gun would have a known history.

Det. Kilroy testified substantially the same as did Detective Drummond. However, there was one curious, perhaps substantial difference. That is, Detective Drummond said he and Det. Kilroy knew one of the two youths by name (T1-p.6). On cross examination Det. Drummond admitted he didn't know the youth by name but Det. Kilroy did (T1-p.22). Det. Kilroy said he knew the two boys (T1-p.32). On the other hand Richard Warme testified that

he knew Det. Kilroy, but only by sight (T2-p.31).

Richard Warme, who initially informed the police about the alleged contraband (T2-p.29) testified that he had been employed at various times by the defendant (T2-p.24) but could not prove that he was so employed (T2-p.36). He further testified that on November 7, 1963, at about 3:00 p.m., he took defendant's automobile to purchase some whisky for Roberts (T2-p.50), although Roberts is not a drinker. Significantly, Warme, at the time of trial was 17 years old, hence, not old enough to purchase the whisky (T2-p.39). Warme instead of just running the errand went instead to visit a friend at 1560 Pelham Parkway (T2-p.52). Several hours later when he left the friend's apartment he couldn't start the automobile. Supposedly he called the shop to tell the defendant of his trouble but no one answered (T1-p.50); he got back to the shop about 9:30 p.m. (T2-p.51). Querie, if Warme told the truth then why was the automobile at the police station when the defendant was picked up by the detectives at 11:00 p.m.? Did the youths, after 9:30 p.m. continue to have possession of the automobile? At any time was the theft reported on a general alarm or an active search by the detectives made? While the record is barren of such testimony answers to

those questions are certainly relevant.

Indeed, on cross examination Richard Warme stated he did not like the defendant (T2-p.30, p.31).

Moreover, when asked what school he was attending, Warme, 17 years old, stated, "Junior High School 118" (T2-p.39). On cross examination Warme said he wasn't presently going to school, in fact he hadn't been going to school since he was 16 years old (T2-p.39). Was this response by Warme an attempted deliberate lie to mislead the court, if so, we respectfully implore the Court to invoke the doctrine "Falsus in uno, falsus in omnibus."

Curiously, to date, if a police radio, 2 pistols and ammunition were found by police, the defendant has never been so charged. Were any of these articles, including the marijuana, on the premises with the knowledge of the defendant, if at all? How did Richard Warme know all about the contraband? This significantly has never been explained, nor can it.

However, the inescapable question remains, if the defendant did in fact possess marijuana and the other articles so easily accessible as to be seen by Warme, as we are told, would he have invited the police, as is urged by the other side, to search the premises? Since Richard

Warme made the initial accusation and was subsequently taken to the shop with the detectives, was it perhaps he, not Roberts, who possessed the marijuana, again, if it existed at all. Roberts was never shown the alleged contents of this bag which supposedly contained the marijuana.

If, on the other hand, the detectives took the defendant back to the shop without an invitation, to which there is objective proof, we question whether or not any consent which allegedly may have been given (although not admitted) was given under submission to a policeman's authority.

OUR CONTENTIONS

We respectfully contend:

1. The record of the trial is replete with significant instances wherein and whereby the presumption of defendant's innocence is not controverted beyond a reasonable doubt.

2. The evidence resulting from a search of defendant's premises used to convict the defendant of the charge, a misdemeanor, was acquired without the aid of a search warrant and made without the consent of the defendant; any arrest made after such illegal search, for a misdemeanor, is unlawful.

3. Even were the facts as alleged by the People, the conviction must fall because there is no evidence that defendant was advised of his constitutional rights herein and given the opportunity to have the advice of counsel; since his complaint initiated this series of events and since it is doubtful they could have attained a warrant, on the meager, incredible testimony of the alleged car thief.

POINT I

IN THE INTEREST OF JUSTICE AN INTERMEDIATE APPELLATE COURT MAY REVIEW THE WEIGHT OF EVIDENCE

It is contended by the defendant that this court may review his conviction and if satisfied that the verdict was against the weight of evidence, it may order, in the interest of justice, a new trial.

This contention is bolstered by the substance of Section 527 of the Code of Criminal Procedure. As the Court said in People v. Wood, 10 AD 2d 231, 234 (3rd Dept-1960):

> "Although defendant's counsel failed to take proper exceptions to the court's charge an appellate court may order a new trial if it is satisfied that the verdict against the prisoner was against the weight of evidence or against the law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below (Code Crim. Pro., §527)."

Similarly, although denying the appeal, the Appellate Division, First Department, in People v. Kahigas, 18 A. D. 2d 1064, 1065 (1963) said:

> "...We may, regardless of objections or exceptions, in the interests of justice direct a new trial. (People v. Kelley, 12 N. Y.2d 248.)"

Reviewing the inconsistent testimony of the witnesses, the seriousness of the charges and the incredible invitation allegedly offered by the defendant and the many unanswered questions, a new trial is warranted in the interest of justice. To appellant, this case bears the elements of a nightmare, his car is stolen, he complains, and suddenly he is the accused in a flip-flop reminiscent of Alice In Wonderland. Why the police were so desirous of not prosecuting the neighborhood boy, Warme, is unclear, but their testimony, so contradictory, when considered together with Warme's, and so logically unsound, particularly in view of Torres' testimony and Roberts' character, warrants relief by this Court.

POINT II

EVIDENCE ACQUIRED FOR THE PROSECUTION OF A MISDEMEANOR PURSUANT TO A SEARCH MADE WITHOUT THE BENEFIT OF A SEARCH WARRANT TAINTS THAT EVIDENCE; THAT EVIDENCE IS INADMISSIBLE AND ANY ARREST MADE ON THE BASIS OF IT IS UNLAWFUL.

It is contended by the defendant that even if the

bag of marijuana allegedly found in his auto body shop was his, which is vehemently denied, that evidence was seized without lawful authority. That is, since the charge against him was for a misdemeanor it was necessary that the police officers who made the search to secure a search warrant. Not having done so, however, the evidence acquired as a result of that unlawful search should not have been admitted as proper evidence. It follows that the arrest made following the discovery of the evidence for a misdemeanor not committed in the officers presence and as a result of an unlawful search and seizure is also unlawful.

In People v. Yarmosh, 11 N.Y. 2d 397 (1962) the police officers without a search warrant entered defendant's home through an open door; betting slips in defendant's handwriting were found. The court, in an opinion by Chief Justice Desmond said (at page 400):

> "This forcible breaking into a dwelling house was a violation of Fourth Amendment rights since there was neither search warrant nor consent, and the intrusion and search were not even incident to a lawful arrest since the crimes for which defendants were arrested and tried were misdemeanors only (Mapp v. Ohio, 367 U. S. 643, supra; Johnsen v. United States, 333 U. S. 10; Agnello v. United States, 269 U. S. 20; People v. Defore, 242 N. Y. 13, 18; People v. Loria, 10 N. Y. 2d 368, 373, supra; People v. Moore, 11 N. Y. S. 2d 271, Civil Rights Law, § 8). It was error, therefore, to admit the evidence (Mapp v. Ohio, supra) (emphasis, except under name of cases supplied).

> "The Mapp holding is applicable if the point was preserved for review by objection or by some inquiry by defense counsel into the lawfulness of the methods of getting the evidence or 'at least some effort in that direction' (People v. Friola, 11 N.Y. 2d 157, 159, 182 N.E. 2d 100, 101, 227 N.Y.S. 2d 423, 424, supra.)."

Similarly, in People v. Buys, 42 Misc. 2d 154 (Suffolk County Court - 1964), where the court said (at page 157):

> "...Even assuming that the officers had probable cause to arrest the defendant for a misdemeanor committed in their presence, the fact is that no arrest was made prior to the search, and consequently the search was illegal..."

See also People v. Estroda, 253 N.Y.S. 2d 876 (Sup. Ct., Crim. Term., Kings County, Part I - 1964) in which Judge Sobel extensively reviews the laws of search and seizure; and, Section 177, Code of Criminal Procedure.

It is also contended that if, as alleged by the People, there was a consent by the appellant to have his premises searched, the consent was no more than either his submission under the force of authority or a consent obtained by acts in the nature of entrapment. Clearly, a search made pursuant to such submission is not a lawful search.

For example consider People v. Langella, 41 Misc. 2d 65 (Sup. Ct., Crim. Term., Kings County, Part 1A- 1963) where the court in an opinion by Judge J. Irwin Shapiro

said(at page 71):

> "...In this case the consent to the search of the trunk of the automobile, if any, depends on an implication to be drawn from the delivery of the car key, but the attending circumstances negative that inference and I find it to be the fact that there was merely submission to authority, which is not consent (Johnson v. United States, 333 U.S. 10; Catalanotte v. United States, 208 F. 2d 264; Judd v. United States, 190 F. 2d 649). Under such circumstances, if this were the ordinary search and seizure case dealing with an ordinary individual - not a parolee - I would hold the search to be illegal since a presumption exists against a waiver of constitutional rights (Johnson v. Zerbst, 304 U.S. 458) and the burden of showing consent is on the People (Amos v. United States, 255 U.S. 313; Channel v. United States, F 2d 217). (emphasis supplied).

See also: People v. Porter, 37 Misc. 2d 73 (Sup. Ct., Queens County - 1962).

Upon the foregoing it is submitted that this court find that no consent to the search was given by the defendant, that the search and seizure be deemed illegal and that the arrest of defendant was unlawful.

POINT III

EVEN IF THE DEFENDANT DID CONSENT TO HAVE HIS PREMISES SEARCHED BY THE POLICE HE WAS ENTITLED TO BE ADVISED AT THAT TIME OF ALL HIS CONSTITUTIONAL RIGHTS AND HIS RIGHT TO CONSEL

It is contended that an individual is entitled to be advised of his constitutional rights against self incrimination and of his right to counsel where he is the

subject of a criminal accusation. (See: U.S. Const. Amend. V; N.Y. Const. Act I §6)

Assuming, arguendo, that the defendant consented to have his auto body shop searched by the police after being accused of possessing contraband, he was absolutely entitled to have been advised of his right not to consent. Further, he was entitled to be advised of his right to counsel. Absent the aforementioned opportunities the defendant was deprived of due process of law. (see: U.S. Const. Amend. XIV)

Initially, when considering the rights of individuals under our federal and state constitutions, we respectfully direct the Court's attention to Johnson v. Zerbst, 304 U.S. 458 (1937), where the Supreme Court stated (at page 464):

> "It has been pointed out that 'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'." The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (emphasis supplied)

Recognizing the sanctity of these fundamental rights and the affirmative action by a defendant to waive them, the Supreme Court in Henry v. Mississippi, 85 S. Ct. 564 (1965) said (at page 566):

> "...We vacate the judgment of conviction and remand for a hearing on the question whether the petitioner is to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of the illegally seized evidence." (emphasis supplied)

See also the dissent of Mr. Justice Black.

A defendant's right to counsel is not a right to be treated lightly. The Supreme Court of the United States, the Court of Appeals of the State of New York as well as the intermediate appellate courts and those below have reversed convictions or remanded where the evidence used or confessions made were secured before the defendant had legal counsel. See Escobedo v. Illinois, 378 U.S. 478 (1964); People v. Donovan, 13 N.Y. 2d 148 (1963); People v. Waterman, 9 N.Y. 2d 561 (1961); People v. Meyer, 11 N.Y. 2d 162 (1962); People v. Santmyer, 20 A.D. 2d 960 (4th Dept.-1964); People v. Parisi, 42 Misc. 2d 607 (Oneida County Ct. - 1964)

Although the denial of counsel in the aforementioned cases usually occurred at least contemporaneously with arrest or subsequent to an information being filed we contend that in criminal law and procedure an individual's rights must be protected at all times. Laymen cannot be expected to understand the niceties of procedure nor the utilization of their fundamental rights.

As applied to the appeal herein the defendant doubts the police officers could even have obtained a search

warrant based upon the accusation of two alleged thieves one of whom was an infant; the age of the other alleged thief was not made known at the trial.

It is contended here that the police officers, even if invited to make the search, should have warned the accused that any contraband found at his shop could be used against him. This was not done but should have been done.

CONCLUSION

We respectfully urge that the conviction of the defendant was improper, it should be reversed and a new trial ordered.

Respectfully submitted,

CARL RACHLIN
Attorney for Defendant-Appellant

Carl Rachlin
Sheldon Engelhard
of Counsel

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

- -X

THE PEOPLE OF THE STATE OF NEW YORK

On the Complaint of

DET. FREDERICK DRUMMOND,

Plaintiff-Respondents

-against-

JESSE ROBERTS,

Defendant-Appellant

- -X

STATEMENT UNDER RULE 5531

This is an appeal from a judgment of conviction dated January 17, 1964 by Hon. J. Howard Rossbach, presiding justice, Hon. Ambrose J. Haddock, associate justice, and Hon. Nicholas F. Delagi, associate justice at Part 2B, Criminal Court of the City of New York, County of the Bronx, finding the defendant-appellant guilty of violating Public Health Law Section 3305. No opinion was rendered. No application for a Certificate of Reasonable Doubt was made. The defendant-appilant was sentenced by Hon. Neil P. Bottiglieri, Hon. John B. Lee and Hon. Max Bloom at Part 2B, Criminal Court of the City of New York, Borough of the Bronx

on January 31, 1964, to an indefinite term in the penitentiary; that sentence was suspended. There has been no change of parties or attorneys herein except that the attorney for the defendant-appellant on appeal is Carl Rachlin; Jesse Zaslav was the attorney for the defendant at all times prior to the said appeal. The notice of appeal was served on the 28th day of February, 1964. The appendix method is not being used.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

- -X

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents :

-against- :

JESSE ROBERTS, :

Defendant-Appellant :

- -X

DEFENDANT'S BRIEF

STATEMENT

This is an appeal by the defendant, Jesse Roberts, from a conviction finding him guilty of violating Public Health Law Section 3305, and sentencing him to an indefinite term in the penitentiary; that sentence was suspended.

The defendant, Jesse Roberts, was arrested on November 8, 1963 for allegedly violating Public Health Law Section 3305. He was accused of having in his possession an envelope containing marijuana. (R-p.11)[1]

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[1] "R" refers to page in the Record on Appeal.

That Section provides as follows:

> "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this article."

The defendant was arraigned in the Criminal Court of the City of New York, Borough of The Bronx, Part IA, on November 8, 1963 before Hon. Samuel J. Ohringer. Bail was set at five hundred ($500.00) dollars. (R-p.12)

At the trial in the Criminal Court of the City of New York, Borough of the Bronx, on January 17, 1964, before Hon. J. Howard Rossbach, Presiding Justice, and Hon. Ambrose J. Haddock and Hon. Nicholas F. Delagi, Associte Justices, the defendant was found guilty of violating Public Health Law Section 3305, (R-p.148). No opinion was rendered. No application for a certificate of Reasonable Doubt was made. Mr. Roberts was sentenced in the Criminal Court of the City of New York, Part 2B, Borough of the Bronx, on January 31, 1964 by Hon. Neal P. Bottiglieri, Hon. John B. Lee and Hon. Max Bloom (R-p.153).

FACTS

The defendant, Jesse Roberts, testified that he operated an auto body repair shop for about 8 years at 2030 La Fontaine Avenue, Bronx, New York (R-p.72).

The defendant, denying his guilt further testified; that he was never arrested or ever convicted of a crime; that he never smoked nor owned marijuana; that he is married and has three children, and has been a responsible business man. (R-p.76)

During the afternoon of November 7, 1963, at about 4:30 p.m. or 5:00 p.m. the defendant reported via telephone to the 48th Police Precinct that his automobile had been stolen (R-p.72; p.87). He was directed to make the report in person and did so at the Bathgate Station prior to 6:00 p.m. (R-p.73; p.87).

After making the report the defendant advised an officer that if the car were found he would be at his shop (R-p.73); not having transportation home he would just go back to his shop and work (R-p.73).

Two police officers, prior to midnight on November 7, 1963, came to defendant's shop and reported that his automobile was found and asked him to accompany them to the station house to identify the thieves; (R-p.73) defendant went to the station house in the officer's car (R-p.73). The alleged thieves were two boys, Richard Warme and another boy by the name of Rungo. The officers spoke to the boys and

then took one out of the "cage" and left the station house (R-p.74).

After some time had elapsed the defendant inquired of the desk officer as to what was happening. The defendant was told that one of the alleged thieves threw away the keys to the car and the police officers and the boy were trying to find them (R-p.74; p.86).

About 1:00 a.m., November 8, 1963, the defendant, apparently over the protest of the desk officer, said he was going back to his shop (R-p.75). On the way back, approximately five minutes from the station house, Roberts met on the street a neighbor who said that Roberts' shop was open (R-p.75); this was corroborated by the neighbor, José Torres (R-p.104).

As Roberts approached the open shop, he saw three detectives and the boy identified earlier as alleged thief, Richard Warme; he inquired as to what was going on and asked the intruders to leave (R-p.75).

One of the detectives at or near the door said "Hey, Jess, what's this we have here", referring to an envelope which the People contend contained marijuana (R-p.75; p.83); Roberts did not see the police officers take

the envelope from the hanging sand pail as alleged by the officers (R-p.83). At that point the defendant was placed under arrest (R-p.76).

Significantly, the police officers told the defendant that if Roberts would not press the auto theft charges then the possession of narcotics charge against him would likewise be dropped (R-p.77; p.83); the defendant refused to drop the charges (R-p.83).

Furthermore, contrary to the story of the police officers, the defendant never accompanied the officers back to his shop for the purpose of having it searched (R-p.77), as the testimony of Torres shows (R-p.104).

The defendant testified; that he knew Richard Warme, one of the alleged thieves, for about 6 or 7 years prior to the car theft; that he didn't think the youth was old enough to drive an automobile and therefore never permitted him to use his automobile or tow truck; that Warme would frequently hang around his auto repair shop when he was apparently playing hooky from school or when he stayed away from home; that occasionally he would ask Warme to pick up cigarettes or soda pop from a store around the corner; that Warme was never an employee of the defendant (R-p.80; p.82).

The People's witnesses relate a sequence of events which we believe are contrary to truth and is no more than incredible but nevertheless corroborate some of the important facts, but do not explain truthfully why after the alleged car thieves were found the police went to Roberts' shop.

Detective Drummond testified that on November 7, 1963 at about 6:00 p.m. the defendant made a complaint about his automobile being stolen naming Richard Warme and Rungo as those probably responsible for the theft (R-p.38). The witness stated that he and Det. Kilroy left word at "the poolroom, bowling alley, luncheonettes," which were frequented by the boys, that the detectives wanted to see them (R-p.38). At about 11:00 p.m. the boys arrived at the police station and stated to Det. Drummond that they had not stolen the automobile, rather, that Jesse Roberts lent it to them. (R-p.38; p.39) The defendant was then picked up at his shop by two detectives and brought to the station (R-p.39). The boys, after denying the charges then told the detectives that the defendant had at his shop a police radio, maraijuana, two 32-caliber pistols and a box of ammunition (R-p.39). At that point the defendant allegedly denied the accusations but <u>invited</u> the detectives to search the premises, which

they did (R-p.40). At the defendant's shop, the door of which was supposedly opened by Roberts, and in defendant's presence, the witness stated he found a bag of maraijuana in a sand bucket which was suspended from a hook on a wall (R-p.41). The defendant allegedly then said; (R-p.41)

> "It's mine. You got me. Please leave my four hundred dollar radio in the shop; do not take the radio."

Significantly no "gun" or "ammunition" were ever found since gun would have a known history.

Det. Kilroy testified substantially the same as did Detective Drummond. However, there was one curious, perhaps substantial difference. That is, Detective Drummond said he and Det. Kilroy knew one of the two youths by name (R-p.38). On cross examination Det. Drummond admitted he didn't know the youth by name but Det. Kilroy did (Rvp.54). Det. Kilroy said he knew the two boys (R-p.64). On the other hand Richard Warme testified that he knew Det. Kilroy, <u>but only by sight</u> (R-p.123).

Richard Warme, who initially informed the police about the alleged contraband (R-p.121) testified that he had been employed at various times by the defendant (R-p. 116) but could not prove that he was so employed (R-p.128). He

further testified that on November 7, 1963, at about 3:00p.m., he took defendant's automobile to purchase some whisky for Roberts (R-p.142), although Roberts is not a drinker. Significantly, Warme, at the time of trial was 17 years old, hence, not old enough to purchase the whisky (R-p.131). Warme instead of just running the errand went instead to visit a friend at 1560 Pelham Parkway (R-p.144). Several hours later when he left the friend's apartment he couldn't start the automobile. Supposedly he called the shop to tell the defendant of his trouble but no one answered (R-p.142); he got back to the shop about 9:30 p.m. (R-p.143). Querie, if Warme told the truth then why was the automobile at the police station when the defendant was picked up by the detectives at 11:00 p.m.? Did the youths, after 9:30 p.m. continue to have possession of the automobile? At any time was the theft reported on a general alarm or an active search by the detectives made? While the record is barren of such testimony answers to those questions are certainly relevant.

Indeed, on cross examination Richard Warme stated he did not like the defendant (R-p.122; p.123).

Moreover, when asked what school he was attending, Warme, 17 years old, stated, "Junior High School 118"(R-p.131).

On cross examination Warme said he wasn't presently going to school, in fact he hadn't been going to school since he was 16 years old (R-p.131). Was this response by Warme an attempted deliberate lie to mislead the court, if so, we respectfully implore the Court to invoke the doctrine "Falsus in uno, falsus in omnibus."

Curiously, to date, if a police radio, 2 pistols and ammunition were found by police, the defendant has never been so charged. Were any of these articles, including the marijuana, on the premises with the knowledge of the defendant, if at all? How did Richard Warme know all about the contraband? This significantly has never been explained, nor can it.

However, the inescapable question remains, if the defendant did in fact possess marijuana and the other articles so easily accessible as to be seen by Warme, as we are told, would he have invited the police, as is urged by the other side, to search the premises? Since Richard Warme made the initial accusation and was subsequently taken to the shop with the detectives, was it perhaps he, not Roberts, who possessed the marijuana, again, if it existed at all. Roberts was never shown the alleged contents of this bag

which supposedly contained the marijuana.

If, on the other hand, the detectives took the defendant back to the shop without an invitation, to which there is objective proof, we question whether or not any consent which allegedly may have been given (although not admitted) was given under submission to a policeman's authority.

OUR CONTENTIONS

We respectfully contend:

1. The record of the trial is replete with significant instances wherein and whereby the presumption of defendant's innocence is nt controverted beyond a reasonable doubt.

2. The evidence resulting fsom a search of defendant's premises used to convict the defendant of the charge, a misdemeanor, was acquired without the consent of the defendant; any arrest made after such illegal search, for a misdemeanor, is unlawful.

3. Even were the facts as alleged by the People, the conviction must fall because there is no evidence that defendant was advised of his constitutional rights herein and given the opportunity to have the advise of counsel;

since his complaint initiated this series of events and since it is doubtful they could have attained a warrant, on the meager, incredible testimony of the alleged car thief.

POINT I

IN THE INTEREST OF JUSTICE AN INTERMEDIATE APPELLATE COURT MAY REVIEW THE WEIGHT OF EVIDENCE

It is contended by the defendant that this court may review his conviction and if satisfied that the verdict was against the weight of evidence, it may order, in the interest of justice, a new trial.

This contention is bolstered by the substance of Section 527 of the Code of Criminal Prodedure. As the Court said in People v. Wood, 10 AD 2d 231, 234 (3rd Dept-1960):

> "Although defendant's counsel failed to take proper exceptions to the court's charge an appellate court may order a new trial if it is satisfied that the verdict against the prisoner was against the weight of evidence or against the law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below (Code Crim. Pro., §527)."

Similarly, although denying the appeal, the Appellate Division, First Department, in People v. Kahigas, 18 A. D. 2d 1064, 1065 (1963) said:

"...We may, regardless of objections of exceptions, in the interests of justice direct a new trial. (People v. Kelley, 12 N.Y. 2d 248)"

Reviewing the inconsistent testimony of the witnesses, the seriousness of the charges and the incredible invitation allegedly offered by the defendant and the many unanswered questions, a new trial is warranted in the interest of justice. To appellant, this case bears the elements of a nightmare, his car is stolen, he complains, and suddenly he is the accused in a flip-flop reminiscent of Alice In Wonderland. Why the police were so desirous of not prosecuting the neighborhood boy, Warme, is unclear, but their testimony, so contradictory, when considered together with with Warme's, and so logically unsound, particularly in view of Torres' testimony and Roberts' character, warrants relief by this Court.

POINT II

EVIDENCE ACQUIRED FOR THE PROSECUTION OF A MISDEMEANOR PURSUANT TO A SEARCH MADE WITHOUT THE BENEFIT OF A SEARCH WARRANT TAINTS THAT EVIDENCE; THAT EVIDENCE IS INADMISSIBLE AND ANY ARREST MADE ON THE BASIS OF IT IS UNLAWFUL.

It is contended by the defendant that even if the bag of marijuana allegedly found in his auto body shop was his,

which is vehemently denied, that evidence was seized without lawful authority. That is, since the charge against him was for a misdemeanor it was necessary that the police officers who made the search to secure a search warrant. Not having done so, however, the evidence acquired as a result of that unlawful search should not have been admitted as proper evidence. It follows that the arrest made following the discovery of the evidence for a misdemeanor not committed in the officers presence and as a result of an unlawful search and seizure is also unlawful.

In People v. Yarmosh, 11 N.Y. 2d 397 (1962) the police officers without a search warrant entered defendant's home through an open door; betting slips in defendant's handwriting were found. The court, in an opinion by Chief Justice Desmond said (at page 400):

> "This forcible breaking into a dwelling house was a violation of Fourth Amendment rights since there was neither search warrant nor consent, and the intrusion and search were not even incident to a lawful arrest since the crimes for which defendants were arrested and tried were misdemeanors only (Mapp v. Ohio, 367 U. S. 643, supra; Johnson v. United States, 333 U.S. 10; Agnello v. United States, 269 U.S. 20; People v. Defore, 242 N.Y. 13, 18; People v. Loria, 10 N.Y. 2d 368, 373, supra; People v. Moore, 11 N.Y.S. 2d 271, Civil Rights Law, §8). It was error, therefore, to admit the evidence

(Mapp v. Ohio, supra,) (emphasis, except under name of cases supplied)."

"The Mapp holding is applicable if the point was preserved for review by objection or by some inquiry by defense counsel into the lawfulness of the methods of getting the evidence or at least some effort in that direction [People v. Friola, 11 N.Y. 2d 157, 159, 182 N.E. 2d 100, 101, 227 NY.S 2d 423, 424, supra)."

Similarly, in People v. Buys, 42 Misc. 2d 154 (Suffolk County Court - 1964), where the court said (at page 157):

"...Even assuming that the officers had probable cause to arrest the defendant for a misdemeanor commited in their presence, the fact is that no arrest was made prior to the search, and consequently the search was illegal..."

See also People v. Estroda, 253 N.Y.S. 2d 876 (Sup. Ct., Crim. Term., Kings County, Part I - 1964) in which Judge Soßel extensively reviews the laws of search and seizure; and, Section 177, Code of Criminal Procedure.

It is also contended that if, as alleged by the People, there was a consent by the appellant to have his premises searched, the consent was no more than either his submission under the force of authority or a consent obtained by acts in the nature of entrapment. Clearly, a search made pursuant to such submission is not a lawful search.

For example consider People v. Langella, 41 Misc. 2d 65 (Sup. Ct., Crim. Term., Kings County, Part IA-1963) where the court in an opinion by Judge J. Irwin Shapiro said (at page 71):

> "...In this case the consent to the search of the trunk of the automobile, if any, depends on an implication to be drawn from the delivery of the car key, but the attending circumstances negative that inference and I find it to be the fact that there was merely submission to authority, which is not consent (Johnson v. United States, 333 U.S. 10; Catalanotte v. United States, 208 F. 2d 264; Judd v. United States, 190 F. 2d 649). Under such circumstances, if this were the ordinary search and seizure case dealing with an ordinary individual - not a parolee - I would hold the search to be illegal since a presumption exists against a waiver of constitutional rights (Johnson v. Zerbst, 304 U.S. 458) and the burden of showing consent is on the People (Amos v. United States, 255 U.S. 313; Channel v. United States, F 2d 217. (emphasis supplied).

See also: People v. Porter, 37 Misc. 2d 73 (Sup. Ct., Queens County - 1962).

Upon the foregoing it is submitted that this court find that no consent to the search was given by the defendant, that the search and seizure be deemed illegal and that the arrest of defendant was unlawful.

POINT III

EVEN IF THE DEFENDANT DID CONSENT TO HAVE HIS PREMISES SEARCHED BY THE POLICE HE WAS ENTITLED TO BE ADVISED AT THAT TIME OF ALL HIS CONSTITUTIONAL RIGHTS AND HIS RIGHT TO COUNSEL

It is contended that an individual is entitled to be advised of his constitutional rights against self incrimination and of his right to counsel where he is the subject of a criminal accusation. (See: U.S. Const. Amend. V; N.Y. Const. Act I §6)

Assuming, arguendo, that the defendant consented to have his auto body shop searched by the police after being accused of possessing contraband, he was absolutely entitled to have been advised of his right not to consent. Further, he was entitled to be advised of his right to counsel. Absent the aforementioned opportunities the defendant was deprived of due process of law. (see: U.S. Const. Amend. XIV)

Initially, when considering the rights of individuals under our federal and state constitutions, we respectfully direct the Court's attention to Johnson v. Zerbst, 304 U.S. 458 (1937), where the Supreme Court stated (at page 464):

> "It has been pointed out that 'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'." The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (emphasis supplied)

Recognizing the sanctity of these fundamental rights and the affirmative action by a defendant to waive them, the Supreme Court in Henry v. Mississippi, 85 S. Ct. 564 (1965) said (at page 566):

> "...We vacate the judgment of conviction and remand for a hearing on the question whether the petitioner is to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of the illegally seized evidence." (emphasis supplied)

See also the dissent of Mr. Justice Black.

A defendant's right to counsel is not a right to be treated lightly. The Supreme Court of the United States, the Court of Appeals of the State of New York as well as the intermediate appellate courts and those below have reversed convictions or remanded where the evidence used or confessions made were secured before the defendant had legal counsel. See Escobedo v. Illinois, 378 U.S. 478 (1964); People v.

Donovan, 13 N.Y. 2d 148 (1963); People v. Waterman, 9 N.Y. 2d 561 (1961); People v. Meyer, 11 N.Y. 2d 162 (1962); People v. Santmyer, 20 A.D. 2d 960 (4th Dept.-1964); People v. Parisi, 42 Misc. 2d 607 (Oneida County Ct. - 1964)

Although the denial of counsel in the aforementioned cases usually occurred at least contemporaneously with arrest or subsequent to an information being filed we contend that in criminal law and procedure an individual's rights must be protected at all times. Laymen cannot be expected to understand the niceties of procedure nor the utilization of their fundamental rights.

As applied to the appeal herein the defendant doubts the police officers could even have obtained a search warrant based upon the accusation of two alleged thieves one of whom was an infant; the age of the other alleged thief was not made known at the trial.

It is contended here that the police officers, even if invited to make the search, should have warned the accused that any contraband found at his shop could be used against him. This was not done but should have been done.

CONCLUSION

We respectfully urge that the conviction of the

defendant was improper, it should be reversed and a new trial ordered.

Respectfully submitted,

CARL RACHLIN
Attorney for Defendant-Appellant

Carl Rachlin
Sheldon Engelhard
of Counsel

To be submitted by
ROY BROUDNY

APPELLATE TERM OF THE SUPREME COURT
FIRST JUDICIAL DEPARTMENT

- -x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JESSE ROBERTS,

Defendant-Appellant.

- -x

RESPONDENT'S BRIEF

ISIDORE DOLLINGER
DISTRICT ATTORNEY
COUNTY OF BRONX

MAY 3 REC'D

APPELLATE TERM OF THE SUPREME COURT
FIRST JUDICIAL DEPARTMENT

- x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JESSE ROBERTS,

Defendant-Appellant.

- x

RESPONDENT'S BRIEF

STATEMENT

Defendant appeals from a judgment of the Criminal Court, Bronx County, rendered the 17th day of January, 1964, after trial before Rossbach, Haddock and Balagi, JJ., convicting him of a violation of Section 3305, Public Health Law.

Defendant was sentenced by Bottiglieri, J. to an indefinite term in the penitentiary. Execution of sentence was suspended.

A denial of defendant's pre-trial motion for the suppression of evidence procured through an allegedly unlawful search, is sought by defendant to be brought up for review with the judgment.

THE HEARING ON THE MOTION TO SUPPRESS

The testimony of Officer Drummond and defendant, the sole witnesses at the hearing, inasmuch as it conforms in all essential respects to their trial testimony, will be set forth below.

FACTS

Officer Drummond testified that on November 7, 1963, Jesse Roberts, the defendant, informed the police that his car had been stolen (6).

Later that day the police, having taken two suspects into custody, brought defendant to the station house to make an identification (7).

Roberts made the identification, whereupon one of the suspects informed the police that defendant had marijuana at his place of business (7).

The officer's testimony indicates that defendant, after denying the accusation, stated: "You can come to my place and you can search it if you want to" (8).

Accepting Roberts' offer, Detectives Drummond, Kilroy and Rodriquez, accompanied by Roberts, proceeded to the shop. There defendant renewed his invitation to search (19). In the ensuing search, a bag of marijuana was discovered in a sand bucket suspended from the wall (8-9).

Defendant, when confronted with the marijuana, stated, "It's mine. You got me" (9).

Patrolman Kilroy adduced testimony which, in all germane respects, conformed with that of Patrolman Drummond (29-37).

Defendant testified that after having identified the suspects, he left the police station to return to his shop (42).

Roberts further testified that when he returned to his shop he there found three detectives and Richard Warme, one of the suspected car thieves. Defendant was then confronted with the marijuana and placed under arrest (43-44).

Defendant denied ownership of the marijuana (44).

Jose Torres, called by the defendant, testified that on the night of the search he encountered Roberts walking towards his shop. Torres informed defendant that the shop was open and several people were inside (12-17).

The People called Richard Warme who testified that defendant had invited the police to search his place of business (29).

Warme stated that he had, on several occasions, seen defendant manufacturing marijuana cigarettes (35-38).

POINT ONE

DEFENDANT'S GUILT WAS ESTABLISHED BEYOND A REASONABLE DOUBT.

Detectives Drummond and Kilroy testified that they found a bag containing marijuana secreted in a fire bucket situated in defendant's place of business. When defendant was confronted with the

contraband, he readily admitted that it belonged to him.

Richard Warne testified that he had seen defendant manufacturing marijuana cigarettes in his shop.

This evidence amply sustains the determination of the trial court.

The denial by defendant that the marijuana in question was his created an evidentiary conflict involving an issue of credibility. It has been repeatedly held that the determination of such an issue, which is the exclusive province of the triers of fact, will not be reviewed on appeal.

People v. Tendetnick, 237 App. Div. 9, 11, 12; 260 NYS 277
People v. Atlas, 183 App. Div. 595, 600, aff'd 230 N.Y. 629; 178 NYS 834
People v. Katz, 154 App. Div. 44, 47, 48, aff'd 209 N.Y. 311. 135 NYS 137

POINT TWO

DEFENDANT CONSENTED TO THE SEARCH OF HIS SHOP.

It is a well settled proposition that if consent to a search is knowingly and intentionally given, the necessity for obtaining a search warrant is obviated.

The testimony of Officers Drummond and Kilroy and Richard Warne that defendant invited the police to conduct a search of his place of business provided a more than ample foundation for the determination of the court hearing the motion to suppress that the marijuana was legally obtained.

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The testimony of Officers Drummond and Kilroy and Richard Warme that defendant invited the police to conduct a search of his place of business provided a more than ample foundation for the determination of the court hearing the motion to suppress that the marijuana was legally obtained.

It is difficult to conceive of a clearer example of consent to a search.

POINT THREE

THE POLICE WERE NOT OBLIGED TO WARN DEFENDANT OF HIS CONSTITUTIONAL RIGHTS.

At the time he made certain inculpatory statements, defendant neither was represented by nor had requested the services of counsel. Consequently, it was not incumbent upon the police to either apprise him of his constitutional rights or to arrange for the presence of counsel. People v. Gunner, ____ N.Y. 2d ____ (decided 3/11/65).

CONCLUSION

THE JUDGMENT SHOULD BE AFFIRMED.

Respectfully submitted,

ISIDORE DOLLINGER
District Attorney
Bronx County
Attorney for Respondent

ROY BROUDNY
Assistant District Attorney
Of Counsel

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK
On the Complaint of
DET. FREDERICK DRUMMOND,

Plaintiff-Respondents

-against-

JESSE ROBERTS,

Defendant-Appellant

STATEMENT UNDER RULE 5531

This is an appeal from a judgment of conviction dated January 17, 1964 by Hon. J. Howard Rossbach, presiding justice, Hon. Ambrose J. Haddock, associate justice, and Hon. Nicholas F. Delagi, associate justice at Part 2B, Criminal Court of the City of New York, County of the Bronx, finding the defendant-appellant guilty of violating Public Health Law Section 3305. No opinion was rendered. No application for a Certificate of Reasonable Doubt was made. The defendant-appliant was sentenced by Hon. Neil P. Bottiglieri, Hon. John B. Lee and Hon. Max Bloom at Part 2B, Criminal Court of the City of New York, Borough of the Bronx

on January 31, 1964, to an indefinite term in the penitentiary; that sentence was suspended. There has been no change of parties or attorneys herein except that the attorney for the defendant-appellant on appeal is Carl Rachlin; Jesse Zaslav was the attorney for the defendant at all times prior to the said appeal. The notice of appeal was served on the 28th day of February, 1964. The appendix method is not being used.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

- -X

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents :

-against- :

JESSE ROBERTS, :

Defendant-Appellant :

- -X

DEFENDANT'S BRIEF

STATEMENT

This is an appeal by the defendant, Jesse Roberts, from a conviction finding him guilty of violating Public Health Law Section 3305, and sentencing him to an indefinite term in the penitentiary; that sentence was suspended.

The defendant, Jesse Roberts, was arrested on November 8, 1963 for allegedly violating Public Health Law Section 3305. He was accused of having in his possession an envelope containing marijuana. (R-p.11)[1]

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[1] "R" refers to page in the Record on Appeal.

That Section provides as follows:

"It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this article."

The defendant was arraigned in the Criminal Court of the City of New York, Borough of The Bronx, Part IA, on November 8, 1963 before Hon. Samuel J. Ohringer. Bail was set at five hundred ($500.00) dollars. (R-p.12)

At the trial in the Criminal Court of the City of New York, Borough of the Bronx, on January 17, 1964, before Hon. J. Howard Rossbach, Presiding Justice, and Hon. Ambrose J. Haddock and Hon. Nicholas F. Delagi, Associte Justices, the defendant was found guilty of violating Public Health Law Section 3305, (R-p.148). No opinion was rendered. No application for a certificate of Reasonable Doubt was made. Mr. Roberts was sentenced in the Criminal Court of the City of New York, Part 2B, Borough of the Bronx, on January 31, 1964 by Hon. Neal P. Bottiglieri, Hon. John B. Lee and Hon. Max Bloom (R-p.153).

FACTS

The defendant, Jesse Roberts, testified that he operated an auto body repair shop for about 8 years at 2030 La Fontaine Avenue, Bronx, New York (R-p.72).

The defendant, denying his guilt further testified; that he was never arrested or ever convicted of a crime; that he never smoked nor owned marijuana; that he is married and has three children, and has been a responsible business man. (R-p.76)

During the afternoon of November 7, 1963, at about 4:30 p.m. or 5:00 p.m. the defendant reported via telephone to the 48th Police Precinct that his automobile had been stolen (R-p.72; p.87). He was directed to make the report in person and did so at the Bathgate Station prior to 6:00 p.m. (R-p.73; p.87).

After making the report the defendant advised an officer that if the car were found he would be at his shop (R-p.73); not having transportation home he would just go back to his shop and work (R-p.73).

Two police officers, prior to midnight on November 7, 1963, came to defendant's shop and reported that his automobile was found and asked him to accompany them to the station house to identify the thieves; (R-p.73) defendant went to the station house in the officer's car (R-p.73). The alleged thieves were two boys, Richard Warme and another boy by the name of Rungo. The officers spoke to the boys and

then took one out of the "cage" and left the station house (R-p.74).

After some time had elapsed the defendant inquired of the desk officer as to what was happening. The defendant was told that one of the alleged thieves threw away the keys to the car and the police officers and the boy were trying to find them (R-p.74; p.86).

About 1:00 a.m., November 8, 1963, the defendant, apparently over the protest of the desk officer, said he was going back to his shop (R-p.75). On the way back, approximately five minutes from the station house, Roberts met on the street a neighbor who said that Roberts' shop was open (R-p.75); this was corroborated by the neighbor, José Torres (R-p.104).

As Roberts approached the open shop, he saw three detectives and the boy identified earlier as alleged thief, Richard Warms; he inquired as to what was going on and asked the intruders to leave (R-p.75).

One of the detectives at or near the door said "Hey, Jess, what's this we have here", referring to an envelope which the People contend contained marijuana (R-p.75; p.83); Roberts did not see the police officers take

the envelope from the hanging sand pail as alleged by the officers (R-p.83). At that point the defendant was placed under arrest (R-p.76).

Significantly, the police officers told the defendant that if Roberts would not press the auto theft charges then the possession of narcotics charge against him would likewise be dropped (R-p.77; p.83); the defendant refused to drop the charges (R-p.83).

Furthermore, contrary to the story of the police officers, the defendant never accompanied the officers back to his shop for the purpose of having it searched (R-p.77), as the testimony of Torres shows (R-p.104).

The defendant testified; that he knew Richard Warme, one of the alleged thieves, for about 6 or 7 years prior to the car theft; that he didn't think the youth was old enough to drive an automobile and therefore never permitted him to use his automobile or tow truck; that Warme would frequently hang around his auto repair shop when he was apparently playing hooky from school or when he stayed away from home; that occasionally he would ask Warme to pick up cigarettes or soda pop from a store around the corner; that Warme was never an employee of the defendant (R-p.80; p.82).

The People's witnesses relate a sequence of events which we believe are contrary to truth and is no more than incredible but nevertheless corroborate some of the important facts, but do not explain truthfully why after the alleged car thieves were found the police went to Roberts' shop.

Detective Drummond testified that on November 7, 1963 at about 6:00 p.m. the defendant made a complaint about his automobile being stolen naming Richard Warne and Rungo as those probably responsible for the theft (R-p.38). The witness stated that he and Det. Kilroy left word at "the poolroom, bowling alley, luncheonettes," which were frequented by the boys, that the detectives wanted to see them (R-p.38). At about 11:00 p.m. the boys arrived at the police station and stated to Det. Drummond that they had not stolen the automobile, rather, that Jesse Roberts lent it to them. (R-p.38; p.39) The defendant was then picked up at his shop by two detectives and brought to the station (R-p.39). The boys, after denying the charges then told the detectives that the defendant had at his shop a police radio, marajuana, two 32-caliber pistols and a box of ammunition (R-p.39). At that point the defendant allegedly denied the accusations but <u>invited</u> the detectives to search the premises, which

they did (R-p.40). At the defendant's shop, the door of which was supposedly opened by Roberts, and in defendant's presence, the witness stated he found a bag of maraijuana in a sand bucket which was suspended from a hook on a wall (R-p.41). The defendant allegedly then said; (R-p.41)

> "It's mine. You got me. Please leave my four hundred dollar radio in the shop; do not take the radio."

Significantly no "gun" or "ammunition" were ever found since gun would have a known history.

Det. Kilroy testified substantially the same as did Detective Drummond. However, there was one curious, perhaps substantial difference. That is, Detective Drummond said he and Det. Kilroy knew one of the two youths by name (R-p.38). On cross examination Det. Drummond admitted he didn't know the youth by name but Det. Kilroy did (R-p.54). Det. Kilroy said he knew the two boys (R-p.64). On the other hand Richard Warme testified that he knew Det. Kilroy, <u>but only by sight</u> (R-p.123).

Richard Warme, who initially informed the police about the alleged contraband (R-p.121) testified that he had been employed at various times by the defendant (R-p. 116) but could not prove that he was so employed (R-p.128). He

further testified that on November 7, 1963, at about 3:00p.m., he took defendant's automobile to purchase some whisky for Roberts (R-p.142), although Roberts is not a drinker. Significantly, Warme, at the time of trial was 17 years old, hence, not old enough to purchase the whisky (R-p.131). Warme instead of just running the errand went instead to visit a friend at 1560 Pelham Parkway (R-p.144). Several hours later when he left the friend's apartment he couldn't start the automobile. Supposedly he called the shop to tell the defendant of his trouble but no one answered (R-p.142); he got back to the shop about 9:30 p.m. (R-p.143). Querie, if Warme told the truth then why was the automobile at the police station when the defendant was picked up by the detectives at 11:00 p.m.? Did the youths, after 9:30 p.m. continue to have possession of the automobile? At any time was the theft reported on a general alarm or an active search by the detectives made? While the record is barren of such testimony answers to those questions are certainly relevant.

Indeed, on cross examination Richard Warme stated he did not like the defendant (R-p.122; p.123).

Moreover, when asked what school he was attending, Warme, 17 years old, stated, "Junior High School 118"(R-p.131).

On cross examination Warme said he wasn't presently going to school, in fact he hadn't been going to school since he was 16 years old (R-p.131). Was this response by Warme an attempted deliberate lie to mislead the court, if so, we respectfully implore the Court to invoke the doctrine "Falsus in uno, falsus in omnibus."

Curiously, to date, if a police radio, 2 pistols and ammunition were found by police, the defendant has never been so charged. Were any of these articles, including the marijuana, on the premises with the knowledge of the defendant, if at all? How did Richard Warme know all about the contraband? This significantly has never been explained, nor can it.

However, the inescapable question remains, if the defendant did in fact possess marijuana and the other articles so easily accessible as to be seen by Warme, as we are told, would he have invited the police, as is urged by the other side, to search the premises? Since Richard Warme made the initial accusation and was subsequently taken to the shop with the detectives, was it perhaps he, not Roberts, who possessed the marijuana, again, if it existed at all. Roberts was never shown the alleged contents of this bag

which supposedly contained the marijuana.

If, on the other hand, the detectives took the defendant back to the shop without an invitation, to which there is objective proof, we question whether or not any consent which allegedly may have been given (although not admitted) was given under submission to a policeman's authority.

OUR CONTENTIONS

We respectfully contend:

1. The record of the trial is replete with significant instances wherein and whereby the presumption of defendant's innocence is not controverted beyond a reasonable doubt.

2. The evidence resulting from a search of defendant's premises used to convict the defendant of the charge, a misdemeanor, was acquired without the consent of the defendant; any arrest made after such illegal search, for a misdemeanor, is unlawful.

3. Even were the facts as alleged by the People, the conviction must fall because there is not evidence that defendant was advised of his constitutional rights herein and given the opportunity to have the advise of counsel;

since his complaint initiated this series of events and since it is doubtful they could have attained a warrant, on the meager, incredible testimony of the alleged car thief.

POINT I

IN THE INTEREST OF JUSTICE AN INTERMEDIATE APPELLATE COURT MAY REVIEW THE WEIGHT OF EVIDENCE

It is contended by the defendant that this court may review his conviction and if satisfied that the verdict was against the weight of evidence, it may order, in the interest of justice, a new trial.

This contention is bolstered by the substance of Section 527 of the Code of Criminal Prodedure. As the Court said in People v. Wood, 10 AD 2d 231, 234 (3rd Dept-1960):

> "Although defendant's counsel failed to take proper exceptions to the court's charge an appellate court may order a new trial if it is satisfied that the verdict against the prisoner was against the weight of evidence or against the law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below (Code Crim. Pro., §527)."

Similarly, although denying the appeal, the Appellate Division, First Department, in People v. Kahigas, 18 A. D. 2d 1064, 1065 (1963) said:

"...We may, regardless of objections of exceptions, in the interests of justice direct a new trial. (People v. Kelley, 12 N.Y. 2d 248)"

Reviewing the inconsistent testimony of the witnesses, the seriousness of the charges and the incredible invitation allegedly offered by the defendant and the many unanswered questions, a new trial is warranted in the interest of justice. To appellant, this case bears the elements of a nightmare, his car is stolen, he complains, and suddenly he is the accused in a flip-flop reminiscent of Alice In Wonderland. Why the police were so desirous of not prosecuting the neighborhood boy, Warme, is unclear, but their testimony, so contradictory, when considered together with with Warme's, and so logically unsound, particularly in view of Torres' testimony and Roberts' character, warrants relief by this Court.

POINT II

EVIDENCE ACQUIRED FOR THE PROSECUTION OF A MISDEMEANOR PURSUANT TO A SEARCH MADE WITHOUT THE BENEFIT OF A SEARCH WARRANT TAINTS THAT EVIDENCE; THAT EVIDENCE IS INADMISSIBLE AND ANY ARREST MADE ON THE BASIS OF IT IS UNLAWFUL.

It is contended by the defendant that even if the bag of marijuana allegedly found in his auto body shop was his,

which is vehemently denied, that evidence was seized without lawful authority. That is, since the charge against him was for a misdemeanor it was necessary that the police officers who made the search to secure a search warrant. Not having done so, however, the evidence acquired as a result of that unlawful search should not have been admitted as proper evidence. It follows that the arrest made following the discovery of the evidence for a misdemeanor not committed in the officers presence and as a result of an unlawful search and seizure is also unlawful.

In People v. Yarmosh, 11 N.Y. 2d 397 (1962) the police officers without a search warrant entered defendant's home through an open door; betting slips in defendant's handwriting were found. The court, in an opinion by Chief Justice Desmond said (at page 400):

> "This forcible breaking into a dwelling house was a violation of Fourth Amendment rights since there was neither search warrant nor consent, and the intrusion and search were not even incident to a lawful arrest since the crimes for which defendants were arrested and tried were misdemeanors only (Mapp v. Ohio, 367 U. S. 643, supra; Johnson v. United States, 333 U.S. 10; Agnello v. United States, 269 U.S. 20; People v. Defore, 242 N.Y. 13, 18; People v. Loria, 10 N.Y. 2d 368, 373, supra; People v. Moore, 11 N.Y.S. 2d 271, Civil Rights Law, 58). It was error, therefore, to admit the evidence

(Mapp v. Ohio, supra.) (emphasis, except under name of cases supplied)."

"The Mapp holding is applicable if the point was preserved for review by objection or by some inquiry by defense counsel into the lawfulness of the methods of getting the evidence or at least some effort in that direction [People v. Friola, 11 N.Y. 2d 157, 159, 182 N.E. 2d 100, 101, 227 NY.S 2d 423, 424, supra)."

Similarly, in People v. Buys, 42 Misc. 2d 154 (Suffolk County Court - 1964), where the court said (at page 157):

"...Even assuming that the officers had probable cause to arrest the defendant for a misdemeanor commited in their presence, the fact is that no arrest was made prior to the search, and consequently the search was illegal..."

See also People v. Estrada, 253 N.Y.S. 2d 876 (Sup. Ct., Crim. Term., Kings County, Part I - 1964) in which Judge Sobel extensively reviews the laws of search and seizure; and, Section 177, Code of Criminal Procedure.

It is also contended that if, as alleged by the People, there was a consent by the appellant to have his premises searched, the consent was no more than either his submission under the force of authority or a consent obtained by acts in the nature of entrapment. Clearly, a search made pursuant to such submission is not a lawful search.

For example consider People v. Langella, 41 Misc. 2d 65 (Sup. Ct., Crim. Term., Kings County, Part 1A-1963) where the court in an opinion by Judge J. Irwin Shapiro said (at page 71):

> "...In this case the consent to the search of the trunk of the automobile, if any, depends on an implication to be drawn from the delivery of the car key, but the attending circumstances negative that inference and I find it to be the fact that there was merely submission to authority, which is not consent (Johnson v. United States, 333 U.S. 10; Catalanotte v. United States, 208 F. 2d 264; Judd v. United States, 190 F. 2d 649). Under such circumstances, if this were the ordinary search and seizure case dealing with an ordinary individual - not a parolee - I would hold the search to be illegal since a presumption exists against a waiver of constitutional rights (Johnson v. Zerbst, 304 U.S. 458) and the burden of showing consent is on the People (Amos v. United States, 255 U.S. 313; Channel v. United States, F 2d 217. (emphasis supplied).

See also: People v. Porter, 37 Misc. 2d 73 (Sup. Ct., Queens County - 1962).

Upon the foregoing it is submitted that this court find that no consent to the search was given by the defendant, that the search and seizure be deemed illegal and that the arrest of defendant was unlawful.

POINT III

EVEN IF THE DEFENDANT DID CONSENT TO HAVE HIS PREMISES SEARCHED BY THE POLICE HE WAS ENTITLED TO BE ADVISED AT THAT TIME OF ALL HIS CONSTITUTIONAL RIGHTS AND HIS RIGHT TO COUNSEL

It is contended that an individual is entitled to be advised of his constitutional rights against self incrimination and of his right to counsel where he is the subject of a criminal accusation. (See: U.S. Const. Amend. V; N.Y. Const. Act I §6)

Assuming, arguendo, that the defendant consented to have his auto body shop searched by the police after being accused of possessing contraband, he was absolutely entitled to have been advised of his right not to consent. Further, he was entitled to be advised of his right to counsel. Absent the aforementioned opportunities the defendant was deprived of due process of law. (see: U.S. Const. Amend. XIV)

Initially, when considering the rights of individuals under our federal and state constitutions, we respectfully direct the Court's attention to Johnson v. Zerbst, 304 U.S. 458 (1937), where the Supreme Court stated (at page 464):

> "It has been pointed out that 'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'." The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (emphasis supplied)

Recognizing the sanctity of these fundamental rights and the affirmative action by a defendant to waive them, the Supreme Court in Henry v. Mississippi, 85 S. Ct. 564 (1965) said (at page 566):

> "...We vacate the judgment of conviction and remand for a hearing on the question whether the petitioner is to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of the illegally seized evidence." (emphasis supplied)

See also the dissent of Mr. Justice Black.

A defendant's right to counsel is not a right to be treated lightly. The Supreme Court of the United States, the Court of Appeals of the State of New York as well as the intermediate appellate courts and those below have reversed convictions or remanded where the evidence used or confessions made were secured before the defendant had legal counsel. See Escobedo v. Illinois, 378 U.S. 478 (1964); People v.

Donovan, 13 N.Y. 2d 148 (1963); People v. Waterman, 9 N.Y. 2d 561 (1961); People v. Meyer, 11 N.Y. 2d 162 (1962); People v. Santmyer, 20 A.D. 2d 960 (4th Dept.-1964); People v. Parisi, 42 Misc. 2d 607 (Oneida County Ct. - 1964)

Although the denial of counsel in the aforementioned cases usually occurred at least contemporaneously with arrest or subsequent to an information being filed we contend that in criminal law and procedure an individual's rights must be protected at all times. Laymen cannot be expected to understand the niceties of procedure nor the utilization of their fundamental rights.

As applied to the appeal herein the defendant doubts the police officers could even have obtained a search warrant based upon the accusation of two alleged thieves one of whom was an infant; the age of the other alleged thief was not made known at the trial.

It is contended here that the police officers, even if invited to make the search, should have warned the accused that any contraband found at his shop could be used against him. This was not done but should have been done.

CONCLUSION

We respectfully urge that the conviction of the

defendant was improper, it should be reversed and a new trial ordered.

Respectfully submitted,

CARL RACHLIN
Attorney for Defendant-Appellant

Carl Rachlin
Sheldon Engelhard
of Counsel

OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

- -X

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents :

-against- :

JESSE ROBERTS, :

Defendant-Appellant :

- -X

RECORD ON APPEAL

CARL RACHLIN
Attorney for Defendant-Appellant
Office and P. O. Address
165 West 46th Street
New York, N.Y. 10036
LT 1-8700

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STATEMENT UNDER RULE 5531

This is an appeal from a judgment of conviction dated January 17, 1964 by Hon. J. Howard Rossbach, presiding justice, Hon. Ambrose J. Haddock, associate justice, and Hon. Nicholas F. Delagi, associate justice at Part 2B, Criminal Court of the City of New York, County of the Bronx, finding the defendant-appellant guilty of violating Public Health Law Section 3305. No opinion was rendered. No application for a Certificate of Reasonable Doubt was made. The defendant-appellant was sentenced by Hon. Neil P. Bottiglieri, Hon. John B. Lee and Hon. Max Bloom at Part 2B, Criminal Court of the City of New York, Borough of the Bronx on January 31, 1964, to an indefinite term in the penitentiary; that sentence was suspended. There has been no change of parties or attorneys herein except that the attorney for the defendant-appellant on appeal is Carl Rachlin; Jesse Zaslav was the attorney for the defendant at all times prior to the said appeal. The notice of appeal was served on the 28th day of February, 1964. The appendix method is not being used.

CRIMINAL COURT OF THE CITY OF NEW YORK
PART 2B, BOROUGH OF THE BRONX

THE PEOPLE OF THE STATE OF NEW YORK,

On the Complaint of

DET. FREDERICK DRUSSEIL,

Plaintiff,

-against-

JESSE ROBERTS,

Defendant.

NOTICE OF APPEAL

S I R S:

PLEASE TAKE NOTICE that the defendant herein, Jesse Roberts, appeals to the Appellate Term of the Supreme Court of the State of New York held in and for the First Judicial Department from a judgment convicting him of violation of Section 3305 of the Public Health Law of the State of New York by the Honorable J. Howard Rosebach, Honorable Nicholas F. Delagi and Honorable Ambrose Haddock, on the 17th day of January, 1964, and from the sentence imposed therein by the Honorable John B. Lee and the Honorable Neil P. Bottiglieri on the 31st day of January, 1964, sentencing the defendant to an indefinite term in the penitentiary, and from each and every part thereof.

Dated: New York, N.Y.
February 28, 1964

Yours, etc.
CARL NACHLIN
Attorney for the Defendant
Office and P.O. Address
165 West 46th Street
New York, N.Y. 10036

4

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

----------X

PEOPLE OF THE STATE OF NEW YORK

vs.

JESSE ROBERTS,

Defendant.

----------X

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavits of JESSE ROBERTS, and JESSE ZASLAV, Esq., sworn to the 26th day of November, 1963 and upon the arraignment, all the pleadings and proceedings had herein, the undersigned will move this Court at Part 1A , Criminal Court, City and State of New York, at 162nd Street, Washington Avenue, on the 5th day of December, 1963 at 10 o'clock in the forenoon of that date or as soon thereafter as counsel can be heard for an order supressing the evidence obtained in the above mentioned case contrary to the constitutional rights of the defendant.

New York, New York
November 25, 1963

Yours, etc.

JESSE ZASLAV
Attorney for Defendant
Office & P.O. Address
217 Broadway
New York 7, New York

TO:-Isidore Dollinger
District Attorney
Bronx County
161st Street and Grand Concourse
Bronx, New York

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

PEOPLE OF THE STATE OF NEW YORK

vs.

JESSE ROBERTS,

Defendant.

CITY AND STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

JESSE ROBERTS, being duly sworn, deposes and says:

That your deponent is the defendant in the above entitled action and is thoroughly familiar with all the facts and circumstances of this matter.

That your deponent is making this affidavit in conjunction with a motion to suppress the evidence as illegally seized in this particular case.

The entire chain of events in this matter took place on the 7th day of November, 1963 at which time your deponent made a complaint to the 48th Precinct in the Bronx relative to your deponent's stolen car. That your deponent had specifically gone to the police station and made a report in person. Later that day, your deponent once again went to the police station at which time it was indicated by the police officers that one, Richard Warney had taken your deponent's vehicle. At such time your deponent remained in the police station at the request of the officers who continually requested that the charges not be made on Grand

Larceny. Your deponent then returned to his place of business which was located at 2030 La Fontaine Avenue. At such time, I was confronted by the defendant in the case, Richard Warmay with another male defendant and three detectives from the 48th Squad of which one was detective, Fred Drummond. At this time I was interrogated about a radio in my possession which allegedly received police calls and bullet holes in the ceiling and a pistol which was allegedly to be in my possession. It was at such time approximately fifteen minutes after I found the police in the premises that Detective Drummond displayed an envelope to me, the contents of which contained marijuana and he indicated that he had taken the envelope of marijuana from a sand bucket on the wall. At such time, contrary to the Statement of the detective, I vehemently denied the marijuana belonged to me. I at no time permitted these or any other detectives on the premises. I requested that they leave the premises but they refused. At no time during the time in the premises or previous thereto or subsequent thereto did they display a search warrant.

I was subsequently taken to the 48th Precinct at which time I was beaten to a point that required me to be hospitalised for four days. This matter is presently before the Grand Jury of this County.

WHEREFORE, your deponent respectfully requests that the evidence adduced from these illegal search and seizure and subsequent arrest be and hereby be suppressed.

/s/
JESSE ROBERTS

Sworn to before me this
26th day of November 1963

Jesse Zaslav
Notary Public, State of New York
No. 31-4380775
Qualified in New York County
Commission Expires March 30, 1965

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

PEOPLE OF THE STATE OF NEW YORK

vs.

JESSE ROBERTS,

Defendant.

CITY AND STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

JESSE ZASLAV, being duly sworn, deposes and says:

That your deponent is the attorney for the defendant herein and is thoroughly familiar with all the facts and circumstances of this case.

The law today is personally precise in definitive beyond any interpretation of the Courts. The Supreme Court in the United States in the case of "MAPP vs. OHIO" 367 U.S. 643, definitely and without any questions of doubt has caused that any evidence adducted from an illegal search in violation of the constitutional rights of the defendant will be set aside from any evidence adduced therefrom will be disallowed and suppressed from any trial or from being brought before any Grand Jury in any State of the United States.

This defendant was arrested as a result of making a complaint to the Police Department in the 48th Precinct in the Borough of Bronx that his motor vehicle had been stolen.

A series of event was thus started whereby the defendant refused to withdraw his complaint and was subsequently arrested on his premises after what is stated to be a search of those premises without a warrant. It is very clear from the affidavit of the defendant that he denied any admission to the premises. It is also clear from the affidavit of the defendant that he made no admission and it is also very evident that no search warrant had been issued to any member of the police department to make a search of these premises.

The cases in this State are now replete with a reaffirmation of the law as stated in "Mapp vs. Ohio". In a decision decided by the Hon. Justice Shapiro decided on February 15, 1962 in the case of "People vs. Brown" at the County Court, Queens County his Honor said "Ours is not a police state. We are a government of laws and not of men. The trained nose of a gendarme is not an adequate substitute for the United States Constitution"

Your deponent feels that it si the tenure of the feelings of the Appellate Division and Court of Appeals of the State of New York at the present time.

WHEREFORE, your deponent respectfully prays that the evidence adduced as a result of the illegal search and seizure of this case be suppressed and the case under the circumstances be dismissed.

/s/ Jesse Zaslav
JESSE ZASLAV

Sworn to before me this
26th day of November, 1963.
Carl S. Klein
Notary Public, State of New York
No. 30-7291075
Qualified in New York County
Commission Expires March 30, 1965

CRIMINAL COURT OF THE CITY OF NEW YORK

PART 1A, BOROUGH OF THE BRONX

THE PEOPLE OF THE STATE OF NEW YORK	Docket #1A-5536
On the complaint of	Charge: 3305 PHL
DETECTIVE DRUMMOND	
-against-	
JESSE ROBERTS,	
Defendant	ARRAIGNMENT

Nov. 8, 1963

B e f o r e:

HONORABLE SAMUEL J. OHRINGER,
Judge of the Court

A p p e a r a n c e s:

NATHAN ROSENBLATT, ESQ.
Assistant District Attorney
Attorney for People

JESSE ZASLAV, ESQ.
Attorney for Defendant
217 Broadway
New York, N. Y.

BRIDGEMAN: Patrick Coyle.

Louis F. Lanuto
Official Court Reporter

2 Arraignment

BRIDGEMAN: New arraignment: Docket #5536; Jesse Roberts; 3305 Public Health Law; on the complaint of Detective Drummond.

Officer, do you swear to the affidavit?

THE OFFICER: I do.

BRIDGEMAN: On November 8, at 1:00 a. m., La Fontaine Avenue, you did violate 3305 of the Public Health Law. He states that he did find in an envelope, an alleged -- to be marijuana and when he questioned, you were the owner of the said premises and stated, "All right, you got me. It's mine."

Do you represent the defendant, counseller?

MR. ZASLAV: Yes.

BRIDGEMAN: Represented by --

MR. ZASLAV: Jesse Zaslav, 217 Broadway, New York.

Your Honor please, this defendant, as your record indicates, has no previous record; he has a business in the

3 Arraignment

Bronx; he has a home that's thirty-five thousand dollars that he bought and his mother is in Court and he has a wife and children.

THE COURT: What's your application?

MR. ZASLAV: That he be paroled in his own recognisance.

THE COURT: Has a home worth thirty-five thousand dollars. Five hundred dollars bail. What date?

MR. ZASLAV: Two weeks, Friday?

THE COURT: November 20 -- 29?

THE OFFICER: How about the 29th?

MR. ZASLAV: Yes, that's good. Not good with me, Your Honor.

THE COURT: You said two weeks?

MR. ZASLAV: December 3rd, Your Honor; December 5th, Your Honor.

THE COURT: All right, December 5th; five hundred dollars bail.

BRIDGEMAN: You can make a phone call, free of charge, from the office of the warden.

- - - - -

The above is an accurate copy of the minutes in this case.
Louis J Lamb

CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF THE BRONX : PART 1-A

. X

PEOPLE OF THE STATE OF NEW YORK

Charge:
3305 Public
Health Law.

-against-

JESSE ROBERTS,

Defendant.

. X

December 5, 1963.

B e f o r e :

HON. SAMUEL J. OHRINGER,
Judge.

Appearances :

For the People:
NATHAN ROSENBLATT, Esq.,
Asst. District Attorney.

For the Defendant:
JESSE ZASLAV, Esq.,
217 Broadway, N. Y. City.

- - -

Hyman Levy,
Official Court Reporter.

COURT OFFICER: This is the case of Jesse Roberts, charged with violation of Section 3305 of the Public Health Law, under Docket No. 5536. It has been set down for a hearing or a motion.

THE COURT: What is this, a hearing or a motion?

MR. ZASLAV: It's a motion - a motion to suppress.

THE COURT: Call your first witness.

MR. ZASLAV: May I have the witnesses excluded?

THE COURT: All witnesses are excused, except the defendant and the arresting officer. Are there any other witnesses?

MR. ZASLAV: I don't know. I have just made my motion. That's the way I can find out.

THE COURT: All right. You mare calling the defendant?

MR. ZASLAV: Yes.

J E S S E L. R O B E R T S, the defendant, called as a witness on his own behalf, having been duly sworn by the Court, testified as follows:

BY THE COURT:

Q What is your name?

A Jesse L. Roberts.

Q Where do you live?

A 850 West 161st Street.

Q What is your business or occupation?

A Auto body repair.

DIRECT EXAMINATION

BY MR. ZASLAV:

Q What is your occupation?

A Proprietor of an auto body repair shop.

Q Have you ever been arrested before this?

A I have not.

Q Will you tell the Court exactly the events leading up to this particular arrest?

A On December 7th of 1963, this year -- November, rather.

THE COURT: This is November 8th.

4. Roberts direct

THE WITNESS: Well, November 7th -- my car was stolen - a 1957 Oldsmobile. I reported it to the police station, and in doing so, I left word that if they located my car, that I would be at my shop. Approximately 12.30 or a quarter to 1, on November 8th, two officers came to my shop, and told me they had recovered my car, took me over to the 48th Precinct, and I identified it. They had two fellows that had stolen my car. I left there, went back to my shop. There were three officers and one of the prisoners in my shop. They said they found marijuana in a fire pail hanging on the wall of my shop. I was arrested, and I am here.

Q Now, Mr. Roberts, when you were taken to the police station to make this complaint on your stolen vehicle, was your shop closed?

A My shop was closed. I locked it up.

Q In what manner did you lock it?

A I put padlocks on the outside door.

5. Roberts direct

Q How did the officers get in through that padlock?

A In the stolen vehicle which they had recovered, I had my shop keys, my house keys, and of course the car keys.

Q When you first saw them in there, did you ask them to leave?

A Yes. I asked them, "What are you doing here, and would you leave?", and I was confronted.

THE COURT: Did you give anybody permission to go in there?

THE WITNESS: I gave no one at all at any time permission to go into my shop. I didn't know they were there.

THE COURT: Did you ask them to leave?

THE WITNESS: Yes, I did.

THE COURT: Cross-examine.

Q Did they at any time show you a search warrant?

A No, no search warrant.

Q Did you at any time ask them if they have a search warrant?

A I just asked them to leave - why were they there,

and "Do you have a search warrant to come in?"

Q How long were they in the shop before they found this alleged marijuana?

A I would say, approximately ten minutes, or so. Maybe less.

Q And did they look at anything else in the shop before they went to this pail?

THE COURT: Well, he wasn't there, was he?

THE WITNESS: I was in the shop, at the time.

MR. ZASLAV: He testified that he came back and they were in there.

THE COURT: All right; did they go through the premises while you were there?

THE WITNESS: They went through the premises while I was there.

THE COURT: Did they ask your permission?

THE WITNESS: No, they did not.

THE COURT: Did they tell you what they were looking for?

THE WITNESS: At the time, no, they didn't.

7. Roberts cross

THE COURT: Cross-examine.

Q Did they subsequently tell you what they were looking for?

A Subsequently, no, they never told me - they thought I had a radio - a police radio.

Q Are you in the tow truck business?

A I am in the tow truck business.

Q No further questions.

CROSS EXAMINATION

BY MR. ROSENBLATT:

Q Did you know the two men that stole your car?

MR. ZASLAV: I object.

THE COURT: Overruled. I'll take it subject to connection.

Q Did you?

MR. ZASLAV: There is a case ---

THE COURT: This is a motion to suppress, Mr. District Attorney.

MR. ROSENBLATT: I'd like to get certain facts clear.

THE COURT: I am keeping you within the limits of the motion. I am not trying the case.

8. Roberts cross

MR. ZASLAV: May I indicate for the record that there is a case pending before this court on a complaint ---

THE COURT: I don't want to hear about any other case. If anybody makes a reference to it I'll declare a mistrial. We'll try the motion to suppress. That's what your motion is.

Q Isn't it a fact that the two people that stole your car were your employees?

A No.

Q These two men that stole your car, you testified, were not employed by you at any time?

A No, not at any time.

Q And you came down to the police station voluntarily to identify your car?

A Yes.

Q Did you identify those two people that stole your car?

MR. ZASLAV: I object.

THE COURT: Overruled. Subject to connection.

9. Roberts cross

A To identify the prisoners that stole the car.

Q And you did identify them?

A Yes.

Q Well, did you know the prisoners before this date?

THE COURT: Sustained. We'll try the motion to suppress.

Q Isn'it it a fact that when you left the precinct, you accompanied this officer and two other officers to your place of business?

A I beg your pardon?

Q When you left the precinct, you accompanied this officer and two other officers to your place of business, is that correct?

A No, it's not.

Q Is it also a fact that when you came to your shop, you had the keys, and opened the door?

A No, it's not.

Q Isn't it a fact that you invited in this police officer, and the other police officers?

A No, it is not.

10. Roberts cross

MR. ROSENBLATT: No further questions. One more question.

Q It is your testimony that one of the men that stole your car accompanied this officer and yourself to your place of business, is that your testimony?

A No, it's not.

Q Didn't you testify that one of the defendants went to your place?

MR. ZASLAV: He testified that one of the defendants was in the place.

THE COURT: After he left the police station - I heard that -- counsel happens to be right.

MR. ROSENBLATT: Maybe I am mistaken.

THE COURT: When he got there, that he found one of the thieves with some detectives there.

THE WITNESS: Three, to be exact.

THE COURT: When you left the police station to go back to your place of business, is that correct?

THE WITNESS: Yes.

11. Roberts cross

THE COURT: Who was with you?

THE WITNESS: No one. I walked alone.

THE COURT: You walked alone?

THE WITNESS: I walked alone.

THE COURT: When you got to your place of business, when you left the police station, where were the men who stole the car?

THE WITNESS: One was still in the detention cage, I'd call it. They, in my presence, had taken one of the fellows out.

THE COURT: When you got to your place of business, was the door open or closed?

THE WITNESS: The lights was on, and the door was/o pen.

THE COURT: Who was inside the premises?

THE WITNESS: Three detectives and one prisoner.

Q What was the name of that prisoner?

THE COURT: Let me finish, please. Was this detective one of those -- Frederick Drummond?

THE WITNESS: Yes.

12. Roberts cross

THE COURT: He was already in the place?

THE WITNESS: He was in the place.

THE COURT: What was the name of the prisoner, if you know?

THE WITNESS: Richard Warmey (?)

Q And he was with Detective Drummond?

A Yes, with two other detectives.

Q No further questions.

MR. ROSENBLATT: Are there any further witness/for the defense?

MR. ZASLAV: No.

MR. ROSENBLATT: The People will call the officer.

D E T E C T I V E F R E D E R I C K D R U M M O N D, called as a witness for and on behalf of the People, having been duly sworn by the Court, testified as follows:

BY THE COURT:

Q What is your name?

A Frederick Drummond.

13. Drummond direct

Q State your shield number and assignment, for the record.

A Shield No. 2028; 48th Squad, Bronx.

DIRECT EXAMINATION

BY MR. ROSENBLATT:

Q Detective Drummond, you arrested this defendant on November 8th, 1963, am I right?

A Yes.

Q Will you please tell his Honor all the facts and circumstances, and any observations you had, prior to said arrest?

A It was on November 7th, 1963, approximately 11.30 p. m., while I was doing a tour of night duty in the 48th Squad, at 1925 Bathgate Avenue, in the County of the Bronx, that I received -- upon receipt of information given to my by one Richard Wermy and one Vincent Runge (?), stating that the premises of 2030 LaFontaine Avenue, that there was in that place, marijuana.

Q Where was this, officer, that you received this information?

A In this precinct.

14. Drummond direct

Q Were these two gentlemen being detained at the precinct?

A They were. They were being detained until Jesse Roberts came to make positive identification, that they were the two that stole his automobile. Jesse Roberts was the complainant at that time. Upon receipt of this information, I had a conversation with one Jesse Roberts - not a defendant at that time - as to the allegations.

THE COURT: Where did you have this conversation?

THE WITNESS: In the 48th Precinct -- as to information that there was marijuana in his place of business. Jesse Roberts very proudly said, "You may come back to my place with me and take a look."

Q Did you question the defendant whether he knew those two defendants - those two other invidiuals at the police station?

A Yes, I did.

Q What was his answer to that?

A Jesse Roberts answered that one Richard Warmey worked for him at different intervals during the course

of the year, and that he knew Richard Warmey quite a while.

Q Please continue.

A I, along with my fellow officers, and along with Jesse Roberts, proceeded to 2030 La Fontaine Avenue, in the squad car, at which time Jesse Roberts opened the lock on his door and again invited us into his shop.

THE COURT: What did he say?

THE WITNESS: He put the lights on.

THE COURT: What did he say?

THE WITNESS: He said, "You can come into my shop and look around. I have nothing to hide." We went into the shop, and in the pail on the wall was a bag of marijuana. I then placed Jesse Roberts under arrest for 3305.

THE COURT: Well, did you have any conversation with him prior to placing him under arrest?

The WITNESS: Yes, I did.

THE COURT: What did he say to you - what did you say to him and what did he say to you?

THE WITNESS: Upon finding the evidence

in the pail, I confronted Jesse Roberts with it. He said,"It's mine. You got me." That was it.

Q Now, you, Jesse Roberts, and who else was there?

A My fellow officers, Detective Kilroy, and Detective Rodriguez, of the 48th Squad.

Q Was there anyone else there, besides?

A No, there was not.

Q No further questions.

CROSS EXAMINATION

BY MR. ZASLAV:

Q You referred to a bag of marijuana. Can you describe what you found?

A A bag of marijuana.

THE COURT: Counsel, we are not trying the case.

MR. ZASLAV: I withdraw the question.

THE COURT: The only problem before me is, was he invited in, or did he go in uninvited. Was he on the premises properly or improperly.

MR. ZASLAV: Yes, sir.

THE COURT: We are not trying him, as far

17. Drummond cross

as the evidence is concerned, unless your contention is that there is no marijuana. Let's stick to that issue.

Q Officer, how long have you been on the police force?

A Eight years.

Q Did you ever have any other circumstance where a defendant took you in and showed you evidence?

MR. ROSENBLATT: Objection, your Honor.

THE COURT: Sustained.

Q When you had Jesse Roberts in the police station, did he tell you he was addicted to marijuana?

A No, he did not.

Q And he took you back with two other officers?

A That's correct.

Q When he came into the shop, did he take you over to this fire bucket?

A No, he did not.

Q What did you do when you came into the shop?

A He invited us into the shop to look around.

Q What else did you find there? Did you find anything else?

A Yes, I did.

Q What else did you find?

A I found, in violation of the Administrative Code, a receiver, capable of receiving police calls, which was confiscated by the Department.

Q That wasn't set forth in your complaint?

A That's being taken care of.

MR. ZASLAV: I object to that.

THE COURT: Overruled.

Q Are the two other police officers here?

A No. They are on vacation.

Q Did you know that the motion to suppress was on in this court today?

A I did not.

Q Did you know it when you got here?

A Yes, later on.

Q Did you know, when the case was called, and counsel said there was a motion to suppress, and he was ready on it?

A Yes.

MR. ROSENBLATT: Objection, your Honor.

THE COURT: Overruled.

19. Drummond cross

Q You knew, at that time - that was approximately 10.30?

A That's correct.

Q And did you ask the district attorney or anybody else if you should have the other officers in court?

A I did not.

Q No further questions.

MR. ROSENBLATT: No further questions.

THE COURT: You may step down. Is that both sides?

MR. ZASLAV: Yes.

THE COURT: Do you have any other witnesses?

MR. ZASLAV: No, sir.

THE COURT: Mr. District Attorney?

MR. ROSENBLATT: No. I'll stand on the testimony of this officer.

THE COURT: Any motions?

MR. ZASLAV: Yes. If the Court pleases, at this time, the defendant moves to suppress the evidence in this case. If your Honor please, on this motion, the story is a little far-fetched, in my opinion, to the effect that the defendant

20. Motions.

would take him into the premises, would invite him in, for the purpose of letting himself get arrested.

THE COURT: Well, without debating it, the motion to suppress is denied.

MR. ZASLAV: I respectfully except.

THE COURT: What day for trial?

MR. ZASLAV: I request a three-man bench, some time in January.

THE COURT: That's too far off.

(Discussion regarding adjournment date.)

THE COURT: Make it December 13th. This matter has been around too long now.

MR. ZASLAV: There are some other cases pending in connection with it.

THE COURT: No.

MR. ZASLAV: Will you mark it peremptorily on that day?

MR. ROSENBLATT: Against whom?

MR.ZASLAV: Both sides.

THE COURT: All you have to do is come in and try it. Be ready December 13th.

- - -

Above minutes certified correct.

Herman Levy
Official Court Reporter.

CRIMINAL COURT OF THE CITY OF NEW YORK

PART 2B, BOROUGH OF THE BRONX

THE PEOPLE OF THE STATE OF NEW YORK	Docket #5536
On the complaint of	Charge: 3305 PHL
DET. FREDERICK DRUMMOND	
-against-	
JESSE ROBERTS,	
Defendant.	TRIAL

Jan. 16, 1964

B e f o r e:

HONORABLE J. HOWARD ROSSBACH,
Presiding Judge of the Court

HONORABLE NICHOLAS F. DELAGI,
Associate Judge of the Court

HONORABLE AMBROSE HADDOCK,
Associate Judge of the Court

LUIS GARCIA, ESQ.
Assistant District Attorney
Attorney for People

JESSE ZASLAV, ESQ.
Attorney for Defendant
217 Broadway
New York, N. Y.

BRIDGEMAN: Edward Tuet.

Louis F. Lanuto
Official Court Reporter

BRIDGEMAN: Docket #5536; Jesse Roberts; charged with 3305 of the Public Health Law.

MR. ZASLAV: Defendant is ready.

Jesse Z-a-s-l-a-v, 217 Broadway.

JUDGE ROSSBACH: I sent this case to 2A. How does it happen to get to 2B?

MR. ZASLAV: We waited there and that was the day you were sitting in 1A and we waited there to 3:30 when the People adjourned it -- they didn't have a witness -- and they're back today.

JUDGE ROSSBACH: Now, you want one judge, do you, or three judges?

MR. ZASLAV: Three, sir. You suggested at that time that we couldn't get a trial with three judges --

JUDGE ROSSBACH: Yes.

MR. ZASLAV: -- and, at that time, you sent it out to 2A.

JUDGE ROSSBACH: I sent it to 1A.

MR. ZASLAV: From 1A to 2A.

JUDGE D'LAGI: Let's go!

MR. ZASLAV: If you recall, I originally

requested three judges.

JUDGE ROSSBACH: Let's go!

MR. GARCIA: They have three witnesses and we have four witnesses.

JUDGE ROSSBACH: All right.

MR. ZASLAV: The defendant is ready.

BRIDGEMAN: Quiet!

MR. GARCIA: The People are ready, provided counsel will stipulate that if the police chemist were called, he would testify that the property herein contained twenty-eight grains of cannibis.

MR. ZASLAV: I have no objection.

MR. GARCIA: And it was one-eighth of an ounce, plus twenty-eight grains.

MR. ZASLAV: I have no objection.

MR. GARCIA: The People call the detective.

MR. ZASLAV: Your Honor pleases, at this time, the defendant moves to exclude witnesses.

MR. GARCIA: The People join in that motion.

JUDGE ROSSBACH: All right, all witnesses

in the case of Jesse Roberts, Jesse Roberts step outside and remain outside until called; defendant will stay here.

(Various people leave the courtroom.)

(DETECTIVE FREDERICK DRUMMOND, Shield #2028, 48th Squad, after having been duly sworn, testified as follows.)

DIRECT EXAMINATION

FREDERICK DRUMMOND

BY THE COURT: (Judge Delagi)

Q What is your name?

A Detective Frederick Drummond.

Q What is your shield number?

A Shield #2028.

Q What is your assignment?

A The 48th Squad.

JUDGE ROSSBACH: Counsellor, check your witnesses.

BY MR. GARCIA:

Q Detective Drummond, did you arrest this defendant?

A I did.

Q When and where, sir?

A It was on November the eighth, about 1:00

a. m.

Q Where?

A At 2030 --

MR. ZASLAV: Judge, I can't hear him.

JUDGE ROSSBACH: That's because your witnesses are fighting with the Court Officer.

JUDGE DELAGI: They're not going to be called.

BRIDGEMAN: She says she's a witness, Your Honor, and in the Roberts' case and I told her you directed her out.

JUDGE ROSSBACH: Counsel, will you find out right now --

MR. ZASLAV: You can sit there.

BRIDGEMAN: She said she was a witness.

MR. ZASLAV: She's not a witness.

JUDGE ROSSBACH: All right.

THE WITNESS: November 8, it was on November 8, 1963, at 2030 La Fontaine Avenue, in the Borough of the Bronx.

Q Would you tell the Court the circumstances surround his arrest?

A It was on the evening of November the seventh,

1963 that Jesse Roberts come to the 48th Squad located at 1925 Bathgate Avenue, in the Borough of the Bronx, to make a complaint on his automobile being stolen. Upon taking the complaint, at 6:00 p. m. that evening, were the two boys that were mentioned, came into the Station House 11:00 p.m. that night.

Q Do you know their names?

A Yes, I do.

Q What are their names?

A Rungo was the last name and Richard Warme, was -- R-u-n-g-o, W-a-r-m-e.

Q Continue, officer.

A Jesse Roberts alleged that those two that I mentioned, stole his automobile at 3:00 o'clock in the afternoon on November the seventh.

I asked Jesse Roberts why he waited until 6:00 p. m. to report a theft of his automobile. He stated that he was too busy in his shop and he was able to only come down at 6:00 p. m. that evening.

Det. Kilroy and I, knowing one of the boys by name, went out to his various locations of his hangouts, such as the poolroom, bowling alley, luncheonetts and we left word that we wanted to see the two youths.

At 11:00 p. m. that night, Jesse -- the two youths

came into the Station House and they said, "Did you want to see us?" We said, "Yes. We have a complaint that you were involved in an automobile theft." They said, "We did not take the car; Jesse Roberts lent us the car that afternoon." Jesse Roberts was then picked up at his place of business 11:00 p. m. that night by Detective Kilroy and Detective Vitarbo and the two detectives brought Jesse Roberts back to the Station House where Jesse Roberts made a positive identification that the two boys that we had in our custody at the time were the two that stole his automobile.

They said that Jesse Roberts was lying; Jesse Roberts says, "I was not. You did take my automobile that afternoon." They said, "Well, you are framing us; you are making allegations that aren't true. We are going to tell the police what you have at your place of business."

One of them being employed by Jesse Roberts previous to this arrest, Richard Warme, the one that was arrested, stated that Jesse Roberts had in his place of business, located at 2030 La Fontaine Avenue, a police radio able to receive calls, marijuana, two 32 calibre pistols and a box of ammunition of 32 calibre. Jesse Roberts then

said, "They're lying, officers. You can come to my place and you can search it if you want to." We agreed on Jesse Roberts' invitation. Detective Kilroy, Detective Rodriguez and myself, both of the 48th Squad, went with Jesse Roberts to his place of business at 2030 La Fontaine Avenue. Jesse Roberts opened the lock on his door and invited us into his place of business.

JUDGE DELAGI: Was it a store? What type of premises?

THE WITNESS: It's an automobile body and fender shop.

JUDGE DELAGI: Go ahead.

THE WITNESS: We entered the place of business and we conducted a search upon Jesse Roberts' invitation. I found in the back of the shop, secreted underneath a door panel, a radio able to receive --

MR. ZASLAV: Objection, Your Honor. I move to strike it out as being prejudicial to this case. This defendant isn't charged with that.

JUDGE ROSSBACH: May I see the affidavit?

(Judge Rossbach looks at affidavit.)

MR. GARCIA: Your Honor, I don't see how it can be prejudicial.

JUDGE ROSSBACH: Well, I'll tell you. We're going to excluded it at this time and if it becomes relevant, we will re-consider it.

THE WITNESS: Upon the allegations made by Richard Warma, the defendant who was arrested for the grand larceny of an automobile, I found in the place of Jesse Roberts a bag of marijuana in a sand bucket which is suspended by a hook from the wall. I was in the company of my two partners, Detective Kilroy and Rodriguez and also Jesse Roberts.

I took the bag from the top of the sand and I showed it to Jesse Roberts and having knowledge of marijuana, I confronted Jesse Roberts with what I found on top of the sand bucket. He looked at me and he stated, "It's mine. You got me. Please leave my four hundred dollar radio inthe shop; do not take the radio." I then placed Jesse Roberts under arrest for 3305 of the Public Health Law, possession of marijuana.

Q Do you have that with you?

A I do.

Q May I have it? Would you open the envelope? (The witness opens the envelope in front of the court.)

MR. GARCIA: It's completely sealed and the officer is going to open it.

JUDGE ROSSBACH: Open it from the other end where you sealed it; not from where the chemist sealed it.

THE WITNESS: Yes, I was going to.

MR. GARCIA: Well, the People offer the marijuana as People's Exhibit #1.

MR. ZASLAV: At this time, Your Honors, the defendant objects to the entry of the marijuana on the ground of illegal search and seizure and in violation of the Constitutional rights of this defendant and requests a voir dire.

MR. GARCIA: Your Honor, there has been a motion on to suppress in this case.

THE WITNESS: It was denied.

JUDGE ROSSBACH: It was a motion to suppress?

MR. ZASLAV: I made that motion, Your Honor. If Your Honors please, there is no bar; it's not res judicata. There's newly found evidence since that time and in the interest of justice, I request a voir dire, at this time. I think it's vital to this case.

JUDGE ROSSBACH: Well, to some -- first, however, on the urging of the stenographer, we'll take a short recess.

(The Court takes a short recess and then upon the completion of same, the case was called to trial.)

BRIDGEMAN: Recall; Jesse Roberts; Docket #5536.

JUDGE ROSSBACH: Case on trial. Counsel!

MR. ZASLAV: Yes, Your Honor.

JUDGE ROSSBACH: We have discussed your application.

MR. GARCIA: Your Honor please, I have offered the marijuana into evidence.

JUDGE ROSSBACH: And counsel wants a

voir dire. You requested a voir dire of unlawful search and seizure?

MR. ZASLAV: Yes, Your Honor.

JUDGE ROSSBACH: The papers indicate that the motion to suppress was denied, on December 5.

MR. ZASLAV: Yes, Your Honor.

JUDGE ROSSBACH: You now state that you have, however, newly discovered evidence since that date?

MR. ZASLAV: Yes, sir.

JUDGE ROSSBACH: We feel, as the trial court and as the jury, that motions to suppress with the inevitable hearsay, should be kept out of the trial court. Now, if you have newly discovered evidence, we don't want to preclude a defendant absolutely, but it appears to us that you should then move to reopen your hearing on the motion to suppress before the judge who heard it and submit for his consideration, at that time, any newly discovered evidence.

Now, I can't tell from the handwriting

who did hear this motion. Who did?

MR. ZASLAV: I believe it was --

JUDGE ROSSBACH: Judge Ohringer?

MR. ZASLAV: -- Judge Ohringer.

JUDGE ROSSBACH: What say you, to that procedure? This is a novel question. It seems to us here that if we have a rehearing, number one, we don't know what was and what was not presented before judge Ohringer and, number two, we're going to have before the jury any amount of hearsay which may be damaging and prejudicial to the defendant which, if he defends himself by way of this motion, he's powerless to exclude.

MR. ZASLAV: Well, may I say this, Your Honor. I respectfully except to the decision.

May I indicate for the record, on the basis of the decision, that according to the Mapp vs. Ohio case, as you are well aware of, a voir dire and a motion to suppress was always reserved for an actual trial term and it's only by means of procedure by the Administrative Judges of this particular court which,

I myself, feel is unconstitutional in itself, when a case is before a body they always have a right to hear as to whether evidence is admissible or not.

JUDGE ROSSBACH: True, true and we will go along with you on that, but we will not, as a trial court, and as in effect the jury, permit any hearsy testimony.

MR. ZASLAV: Well, this isn't a question of hearsay. I'm asking for an original hearing here, Your Honor, having nothing to do with any other hearing.

JUDGE ROSSBACH: You will only have a hearing on the admissibility of the evidence and on that hearing and mark this well, because we mean to follow through -- no hearsay testimony will be allowed, not what the officer was told by anybody, nor anything.

MR. ZASLAV: I agree with this.

JUDGE ROSSBACH: Now, if you can upset the ruling of judge Ohringer under those circumstances, well then, you might as well concede; if not, you had better address your re-

quest to judge Ohringer.

MR. ZASLAV: I wish further, to indicate for the record that the reason I did not ask for a hearing, re-hearing on this particular motion, was because I feel that the justices do not have a right to have that hearing in any special part and it's for the trial judge and that was said in Mapp vs. Ohio in a Supreme Court Ruling in the United States.

JUDGE ROSSBACH: Well, again, let me stress the point. You may have a voir dire on the admissibility of this evidence, but no hearsay testimony will be allowed.

MR. ZASLAV: Yes, sir. And I request it under those circumstances.

JUDGE ROSSBACH: If reliance is made, as to probable cause which may have been based on hearsay, we'll be bound by judge Ohringer's decision.

MR. ZASLAV: I agree with that, sir, I agree with that one hundred percent.

JUDGE ROSSBACH: All right, now, you see you know what you are going to bring out;

we don't.

MR. ZASLAV: Yes, sir.

JUDGE ROSSBACH: We're giving you two alternatives: one is to have the voir dire here; the other is to move for a mistrial and move to reopen it.

MR. ZASLAV: I'm requesting once again, a voir dire.

JUDGE DELAGI: All right, proceed.

MR. GARCIA: Your Honor, I have no objection to a voir dire here. However, as to any newly discovered evidence in connection with a motion to suppress, that should be made before judge Ohringer, --

JUDGE ROSSBACH: I agree.

MR. GARCIA: -- on paper.

JUDGE ROSSBACH: I agree.

MR. ZASLAV: Well, it's a question of whether it may actually change my terminology -- it's a question of whether it was actual evidence which was found to be after the testimony of this police officer and that, in and of itself, I would not call it newly found

evidence. At the time the police officer testified, we did not have any idea what he was going to testify to and he testified to a certain occurrence as to wit, there was a witness present and, of course, that witness was not present at our voir dire because we did not know he was going to testify to that.

JUDGE DELAGI: All right, proceed!

JUDGE ROSSBACH: Do you want to proceed? I've given you the two lines of approach.

MR. ZASLAV: Yes, I'd like to proceed.

JUDGE ROSSBACH: You are choosing to proceed by a voir dire under the limitations --

MR. ZASLAV: Yes, sir.

JUDGE ROSSBACH: -- which, I think, we've completely set forth.

MR. ZASLAV: Right, sir; yes, sir.

JUDGE ROSSBACH: All right.

VOIR DIRE

BY MR. ZASLAV:

Q Officer, when you were at the police station, did this defendant directly say to you, that I have marijuana in my place?

MR. GARCIA: Objection, Your Honor.

JUDGE ROSSBACH: Overruled.

MR. GARCIA: That is a question of fact.

JUDGE ROSSBACH: Overruled. Did he say that?

THE WITNESS: I didn't hear the question.

MR. ZASLAV: Would you repeat it, please?

(Court Reporter reads the last question back for the witness.)

A He did not.

Q Then, under what circumstances did you proceed to his shop at La Fontaine Avenue?

A On the fact that Richard Warma being employed by Jesse Roberts during a period of about a year in his shop as a tow truck operator chasing wrecks --

Q Chasing wrecks?

A -- chasing wrecks.

MR. ZASLAV: I object to that, Your Honor, and move to strike it out.

MR. GARCIA: Your Honor, the question

was asked by counsel, under what circumstances and the officer is answering.

MR. ZASLAV: That's unresponsive, chasing wrecks. It has nothing --

JUDGE ROSSBACH: Please, counsellor.

MR. ZASLAV: I'm sorry, Your Honor.

JUDGE ROSSBACH: This once, we will sustain the objection, but let me point out to you again, if you invite a hearsay answer, you are going to be bound by that answer.

MR. ZASLAV: Yes, sir, yes, sir.

JUDGE ROSSBACH: And, again, if there is an objection to hearsay evidence, we'll sustain the objection and exclude it.

MR. ZASLAV: Yes, sir.

Q When you proceeded back to La Fontaine Avenue with this defendant, who else was in your vehicle?

A Detective Kilroy and Detective Rodriguez and myself and Jesse Roberts.

Q And how did you get into his shop?

A Jesse Roberts opened the lock on the door with his key and invited us into his shop.

Q And then he told you to look around, is that

it?

A That's correct.

Q And when you found this marijuana, he said, "It's mine?"

A That is correct.

MR. ZASLAV: I have no further questions, sir.

MR. GARCIA: The People offer the marijuana into evidence.

JUDGE ROSSBACH: All right. Do you object? Objection is overruled. People's Exhibit #1.

JUDGE DELAGI: Received. Deemed marked.

JUDGE ROSSBACH: Deemed marked.

MR. GARCIA: Counsellor has stipulated that if the police chemist were called, he would testify that this contained one-eighth ounce, plus twenty-eight grains of cannibis.

JUDGE ROSSBACH: Cannibis.

BY MR. GARCIA (CONTINUING):

Q The name of the police chemist is what, officer?

A Robert -- looks like B-a-t-e-n.

MR. GARCIA: Your witness.

CROSS-EXAMINATION

BY MR. ZASLAV:

Q Officer, did you know this defendant before this arrest, on November 8?

A No, I did not.

Q Do you know anything about him?

A No, I do not.

Q Did you know he operated a tow truck in your precinct?

A I did not.

Q How long are you in that precinct?

A Precinct, two years, little over two years.

Q You mean to tell me that during the two years' time, you never had knowledge of the fact that there was a tow truck operator there?

MR. CARCIA: I object to the form of the question.

JUDGE ROSSBACH: Question sustained, as to form.

Q Now, you said that you knew one of those boys. Which one were you referring to?

A I did not know him personally. Detective Kil-

roy knew one -- Richard Warme.

Q Well, I think yourtestimony was to the effect that you knew one of them?

A Detective Kilroy knew him.

MR. ZASLAV: I think we can read that back, Your Honor. He said, "I knew the boys in the precinct."

JUDGE ROSSBACH: I think the stenographer would have to go through all of his notes. I think --

JUDGE DELAGI: Is it important?

JUDGE ROSSBACH: My recollection is that he was known to the police, but not --

THE WITNESS: Not by name. I did not know him.

Q Is this the general procedure in a precinct, when a complainant comes in to go out and look in pool rooms and bowling alleys for a respective defendant?

A If the person is known to the Police Department, yes.

Q Was this put on the wire from your precinct, as a stolen car?

A This was not put on the wire as a stolen

car.

Q Well, do you know why?

A Why? We had the names of the perpetrators.

Q But did you know that they were still in the precinct with the car?

MR. GARCIA: Objection.

JUDGE ROSSBACH: Overruled.

MR. ZASLAV: I'm asking him why?

JUDGE ROSSBACH: Please! We ruled in your favor. Don't fight with him!

MR. ZASLAV: Oh!

MR. GARCIA: "Still in the precinct?" I don't understand the question, myself.

JUDGE DELAGI: Counsellor, please!

Go ahead.

THE WITNESS: What was the question?

MR. ZASLAV: Read it back!

JUDGE DELAGI: Did you know that they were still in the precinct?

A We conducted our immediate search and -- for the boys in these locations.

Q Well, the complaint, you said, came in at 3:00 o'clock, right?

A Came in at 6:00 p. m., 6:25 p. m., to be exact, to the squad.

Q And when did you call the defendant down to the precinct?

A The defendantscame in about, approximately 11:00 p. m. that night on their own.

Q What conversation did you have directly with the defendant about the matter and -- about the marijuana in his place?

A I questioned -- during the course that the two defendants were detained in the station house and when Jesse Roberts came in and made the positive identification as those two, as being the ones that stole his automobile, did they then, Richard Warma --

MR. ZASLAV: If Your Honor please, I move to strike out the answer as unresponsive and request that the question be repeated. I asked him whether he had any direct --

JUDGE ROSSBACH: Sustained. Askthe question.

MR. ZASLAV: Read the original question back, please.

(Court Reporter reads last question back for the attorney.)

Q Did you have any dir-ction conversation with the defendant pursuant -- pertaining to this marijuana?

A Jesse Roberts?

Q That's the defendant.

A So what is the --

JUDGE DELAGI: No. He's the defendant.

Q I'm speaking about this defendant.

A The defendant. Only at the time I was informed from Richard Warma --

JUDGE ROSSBACH: All right, strike that out!

JUDGE DELAGI: The answer is yes, isn't it?

THE WITNESS: Yes.

JUDGE DELAGI: Why don't you answer it that way.

Q You had no direct knowledge yourself, is that true?

A No, I did not.

Q And he, at this time says, "Well, let's go back to my place and I'll show you where it is," is that correct?

A He invited us back to search his place.

Q I see. How long are you a police officer?

A Going on nine years.

Q Now, have you ever had occasion before where you had -- did you ever have occasion before where a defendant took you down to show you where evidence was, or is this the first time?

MR. GARCIA: I'll object, Your Honor.

JUDGE DELAGI: Overruled.

A Jesse Roberts, defendant in this case, did not show me where the evidence was.

Q Well, he took you to the place, right?

A He took me to his place of business. We conducted a search.

Q You found a whole bunch of stuff?

A I found it without his knowledge.

Q Without his knowledge?

A He did not say, well, this is where it is. I searched the place on his request and I came up with the marijuana on top of the sand bucket, suspended from

the wall.

JUDGE ROSSBACH: Mr. Garcia!

MR. GARCIA: Yes?

JUDGE ROSSBACH: I'm not going to hold up the other cases any longer.

(At this time the court called the balance of the cases and adjourned them for the day, after which the present case was then recalled.)

BRIDGEMAN: Recalled; Docket #5536; Jesse Roberts; charged with 3305 Public Health Law.

BY MR. ZASLAV (CONTINUING):

Q Now, officer, did you just testify that you knew all these -- you found all of these things there without the knowledge of Jesse Roberts? What do you mean by that?

A By not directly saying, Detective Drummond, they're in the corner; this is this and this is over here.

Q How long did he say you could search in there? Did he give youa time limit?

A He did not give us a time limit.

Q In other words, you could search six or seven months?

MR. GARCIA: Objection, Your Honor.

JUDGE ROSSBACH: Yes, sustained.

Q Well, how long do you think?

A When I started my search with my partners, Detective Rodriguez and Kilroy were there about ten minutes, did I find the radio secreted in the back of the shop and from there --

MR. ZASLAV: I object!

JUDGE DELAGI: Sustained. Listen, please, officer and don't volunteer anything. I will sustain an objection of the question here.

JUDGE ROSSBACH: Yes.

JUDGE DELAGI: Not relevant.

JUDGE ROSSBACH: It's not responsive.

Go ahead.

MR. ZASLAV: No further questions, Your Honor.

JUDGE ROSSBACH: Step down.

MR. GARCIA: I call Detective Kilroy.

(DETECTIVE JOHN P. KILROY, Shield #1663, 48th Squad, after having been duly sworn, testified as follows.)

DIRECT EXAMINATION

JOHN P. KILROY

BY JUDGE DELAGI:

Q What is your name?

A Detective John P. Kilroy.

Q What is your shield number?

A Shield #1663.

Q What is your assignment, officer?

A The 48th Squad.

BY MR. GARCIA:

Q Detective Kilroy, when you were with Detective Drummond on November 8, 1963 --

MR. ZASLAV: I object to the form of the question.

Q -- at about 1:00 a. m. --

MR. ZASLAV: He didn't testify that he was with him.

JUDGE ROSSBACH: Overruled. We're not near yet --

THE WITNESS: Yes, I was, personally. Night Duty from 5:00 p. m. on the 7th until 8:00 a. m. on the 8th.

Q And did you, thereafter, have occasion to go to premises 2030 La Fontaine Avenue, in the county of the Bronx?

A Yes, sir, I did.

Q Would you tell us what happened, at that place, on November 8, 1963?

A We proceeded to search the area itself, a body and fender shop and in the rear panel under a rear panel of a car, Detective Drummond found a police radio receiver.

MR. ZASLAV: Objection, Your Honor.

JUDGE DELAGI: Yes, sustained.

JUDGE ROSSBACH: Sustained.

JUDGE DELAGI: It's not relevant to the case at bar.

MR. GARCIA: In connection with this?

JUDGE DELAGI: In connection with nothing. Let's go.

Q What happened, officer?

A As we were searching the other side of the premises, I was looking behind tools and things on the floor and Detective Drummond retrieved from a sand bucket which was hanging on the wall, a brown manila

envelope.

Q Continue.

A Defendant Roberts was standing and Detective Drummond spilled some of the contents in his hand and showed it to the defendant Roberts and said, "This is marijuana." Defendant Roberts says, "All right, you got me. It's my stuff. Would you leave the radio here."

Q And is this the marijuana, People's Exhibit #1?

A Yes, sir.

MR. GARCIA: Your witness.

CROSS-EXAMINATION

BY MR. ZASLAV:

Q How long have you been in the precinct?

A How long have I been a precinct --

Q How long have you been in the precinct?

A Seven years.

JUDGE DELAGI: The precinct.

Q Did you know that Jesse Roberts operated a tow truck in this area, in the precinct?

A No, sir.

Q Nobody ever saw him there, is that right?

A I didn't.

Q Was he known in the precinct?

A Not to me he wasn't.

Q Under what circumstances, did you go to his shop?

A He had come in early on the evening of the 7th to make a complaint about his car being stolen.

JUDGE ROSSBACH: What?

THE WITNESS: He came in in the evening of the 7th to make a complaint about his car being stolen, he came in with the names of the two boys that he stated stole the car. I knew the two boys and I went down later on inthe evening with Detective Drummond and I -- Vitarbo, to the bowling alley where I knew they frequented and an ice cream parlor and left word for them to come in and they came in about 11:00 o'clock, quarter to eleven that day and they had the keys to the car.

Q They came in, themselves?

A Yes.

Q Detective Drummond just testified that you went out and picked them up?

A I don't know what Detective Drummond testi-

fied.

MR. GARCIA: I'll object.

Q Be sure --

JUDGE ROSSBACH: Sustained.

Q Did they come in by themselves, or did you pick them up?

A They came in by themselves.

Q You are sure of that?

A Yes.

Q And then, what happened?

A They told me that the -- defendant Warme, anyway, the boy Warme told me that he had worked for Roberts and that Roberts gave him the keys and told him to take the car and go get him a bottle of whisky or bottle of wine -- I'm not sure which -- and that while he had the car, he went to see hisestranged wife who lived up on Pelham Parkway South, I believe, and that when he tried to return, the car wouldn't go and he -- the battery was dead and he tried to call Roberts several times and couldn't get him at the shop. So he came back down with his friend and they went to eat and then they went to the bowling alley where he heard where I was looking for them and they came with the

keys.

Q You called him at the pool room?

A No, sir. I went down to the bowling alley and ice cream parlor.

Q And you left word?

A I left word with the other boys in the neighborhood to come in and see me.

Q Well, did you know this defendant in the other case, the one that allegedly took the car, did you know him?

A There were two defendants in the other case.

Q Did you know either one of them?

A I knew both of them.

Q And under what circumstances, did you know them?

A Kids in the neighborhood. I know them for years.

Q Just kids in the neighborhood?

A That's right.

Q Did you know whether they had ever been in trouble before?

A I don't think they've ever been convicted of any crime.

JUDGE ROSSBACH: What?

Q You don't think they've ever been convicted of a crime. But had they ever been in trouble?

MR. GARCIA: I'll object to this line of questioning.

JUDGE ROSSBACH: Yes, sustained.

Q Now, under what circumstances did you immediately proceed to the defendant's shop, at 1:00 o'clock in the morning?

A We went earlier to the shop; we went about 11:30, quarter to twelve.

Q Eleven-thirty, you went to the shop?

A Around that. We brought the defendant back.

Q Yes.

A And I confronted the defendant with the two boys who were engaged -- and he stated they were the ones that stole his car and after a further conversation with the boys, the defendant Warme stated that he knew of some --

JUDGE ROSSBACH: All right, any objection?

MR. ZASLAV: Objection, Your Honor.

JUDGE ROSSBACH: Yes, sustained. Strike

it out!

THE WITNESS: We proceeded over there about 1:00 o'clock.

Q Well, did you have a conversation with Roberts, before you went back?

A Detective Drummond did -- had a conversation with Roberts.

Q Did you ever have any conversation with him?

A I was there. I don't believe I spoke to him.

Q You didn't speak to him, at all?

A I'm not sure. I don't think so.

Q Now, what time did you get back to his shop?

A About quarter after one, one o'clock, I guess.

Q You got back to the shop one o'clock, right?

A Somewhere around there.

Q You say that you brought him into the precinct 11:30. What happened between 11:30 and 1:00?

A The processing of prisoners.

Q Whom were you processing?

A The defendants, on the grand larceny.

Q And what time were they booked?

MR. GARCIA: I'll object, Your Honor. That's immaterial.

MR. ZASLAV: Well, it's relevant.

JUDGE ROSSBACH: Well, we'll allow it just on the question of time.

A I don't know what time they were booked. It was late in the morning, before everybody was booked. We had other prisoners besides that in the station house.

Q And JesseRoberts went back in the car with you?

A Yes.

Q And who opened the shop?

A Jesse Roberts.

Q Did he have his keys?

A He had the key that we gave him when we brought the car back down from Pelham Parkway South.

MR. ZASLAV: No further questions, Your Honors.

JUDGE ROSSBACH: All right, step down.

MR. GARCIA: Your Honor, the People have other witnesses which they may use in

rebuttal. At this time, that's the People's case.

JUDGE ROSSBACH: All right, motion?

BRIDGEMAN: Stand up, please (speaking to defendant).

MR. ZASLAV: Are the People calling in their place, subject to further examination, Your Honor --

JUDGE DELAGI: The People are resting, I understand.

JUDGE ROSSBACH: That's the People's case.

MR. GARCIA: The People are not resting, but that's --

JUDGE DELAGI: The People have indicated --

MR. ZASLAV: Subject to rebuttal witnesses, is that right, sir?

JUDGE DELAGI: Well, they always may.

JUDGE ROSSBACH: That's what the man said.

MR. ZASLAV: That's what he specifically said. That's what I don't understand.

JUDGE ROSSBACH: Yes.

MR. ZASLAV: Your Honors, please, at this time the defendant moves to dismiss on the grounds that the People failed to establish a prima facie case.

JUDGE ROSSBACH: Denied.

MR. ZASLAV: Take the stand!

(JESSE ROBERTS, the defendant, after having been duly sworn, testified as follows.)

DIRECT EXAMINATION

JESSE ROBERTS

BY JUDGE DELAGI:

Q What is your name?

A Jesse Roberts.

Q Where do you live?

A 850 East 161st Street.

BY MR. ZASLAV:

Q Mr. Roberts, what is your business or occupation?

A I'm auto body repairman.

Q And where is your place of business located, Mr. Roberts?

A 2030 La Fontaine Avenue, Bronx, New York.

Q And how long have you been there?

A Approximately eight years.

Q And how long have you had a license to operate a tow truck?

A Oh, five years.

Q Do you know any of the two witnesses that testified here today?

A Yes.

Q Had you ever seen them before?

A No.

Q Have you ever seen them before November 8th?

A When I went to the station house to report the car stolen.

Q But had you ever seen them before then?

A No.

Q No. Now, would you tell the Court exactly what happened on November 8, 1963?

A I reported my car stolen at the 48th Precinct.

JUDGE ROSSBACH: That was actually on November 7.

THE WITNESS: On November 7.

JUDGE ROSSBACH: On November 7, in the evening.

THE WITNESS: That's correct. At the Bathgate Station and I went back to my shop and I went back to work. I had informed the officers I had no means of transportation to get home, so evidently I probably been around the shop practically all night so if they would locate my car, they were able to locate it, I'd be there. So come on over.

Approximately 11:00 o'clock, 11:00, between -- no, it was after that. I'd say around 12:00, 12:00 o'clock in the morning, two officers came to my shop and says, "We have located your car." I said, "Fine." They said, "Come over to the station house and identify it for us." And I got into their car and they took me to the station house and they had the two fellas. Well, one I know, almost, you know, and I identified them and they asked me to sit down, the officers, and they had a conversation

with the two prisoners and they took one prisoner out of the cage and they left the station house, and I sit there watching them doing their routine work and I asked the Desk Officer, "Well, what's what?" They had waited around. "The fella that stole the car," he says, "threw the keys away." You see, on the --

JUDGE ROSSBACH: Now, which officer said that?

THE WITNESS: This is the officer inside of the station house.

JUDGE DELAGI: Neither one of these two?

THE WITNESS: Neither one of these two, neither one of these two. And this fella Warma, was -- he knew where he had thrown the keys and they were going to find the keys so they could give me my car.

So I sit there and time went by. I looked at the clock; was getting close to one o'clock. So I told the officer then, I says, "Look! I may as well walk on back

to my shop because I see nothing here." So he wanted me to stay there. I didn't see any reason why I should. So I took a walk right on back because I'm only maybe five minute walk from the station house, and I'm walking up the street and I see a friend of mine and he says, "Bobby, your shop is open." I said, "What?" I went on to my shop and I got to my shop there was three detectives and Richard Warme in my shop and I asked them, "What's going on," and asked them to leave and --

Q Mr. Roberts, these police officers said that they showed you marijuana and asked you, "Does that belong to you?" Did that ever occur?

A No, sir. One officer was talking to me like almost on the outside of the door. When I heard my name -- people that don't know me, they call me Jess -- and they say, "Hey, Jess what's this we have here!" And he had a brown paper bag similar to this, like this (indicating) and I turned around and he's got it in the shop. We have fire laws and rules, so you have to have sand pails and near to a big door where we have the cars come in and out and he's standing there with this package of which he says was marijuana in

his hand. He says, "Oh, that was it," and I was placed under arrest.

Q Now, did you ever smoke marijuana?

A No, sir, never did.

Q Did you ever own any marijuana?

A Never.

Q Have you ever been convicted of a crime?

A Never.

Q Have you ever been arrested?

A Never.

Q Are you married?

A Yes.

Q Do you have any children?

A Three; one boy, two girls.

Q Is your wife in court?

A Yes.

Q Where do you reside, sir?

A I reside in New Jersey.

Q Whereabouts?

A Teaneck.

Q Do you have an apartment or a house, there?

A I have a house.

Q Now, are you sure when you testified that you

never went back to the -- with these police officers to your premises?

A Am I sure?

Q Are you sure of that?

A Sir, it was raining that night. I'm sure I went in that car once when they came to my shop to take me over to identify these --

Q Let me ask you this question -- and it's very important here, Mr. Roberts. Did any police officer, at any time, ask you to withdraw the charges against the two proposed complainants?

MR. GARCIA: I'll object to the form of the question.

JUDGE ROSSBACH: Overruled.

Q Did they ask you to withdraw the charges?

JUDGE ROSSBACH: To drop the charges against Warme and the other --

THE WITNESS: Yes.

JUDGE ROSSBACH: Who?

THE WITNESS: One of the detectives; which one, I don't know.

Q Was it either one of the detectives in Court today?

A There's a third one; it's one of them.

Q You don't recall?

A I don't recall.

MR. GARCIA; I'll object, as the answer is not responsive.

JUDGE ROSSBACH: Well, it's the best he can give. Overruled.

Q And what did you say, when they asked you to withdraw the charges?

A I said, "No."

Q And is that the time that they asked you for your keys, to go to your place?

A Oh, in the station house you are talking about?

Q Yes.

MR. GARCIA: I'll object to the leading, Your Honors.

JUDGE ROSSBACH: Yes, sustained.

Q Well, what happened after you refused to withdraw the charges, what took place then?

A That's when the marijuana came up.

MR. GARCIA: I'll object to the question.

MR. ZASLAV: I have no further questions, Your Honor.

MR. GARCIA: I move that that answer be stricken.

JUDGE ROSSBACH: Overruled.

Cross-examine!

CROSS-EXAMINATION

JESSE ROBERTS

BY MR. GARCIA:

Q Mr. Roberts, did you tell the police officers that you lived at 850 East 161st Street, County of the Bronx?

MR. ZASLAV: I object to that, Your Honor.

JUDGE ROSSBACH: Overruled.

A Yes.

Q Were you telling the truth then?

A Yes. That's my city address, business and city address.

Q On questioning of your own attorney a little while ago, didn't you state that you lived in New Jersey?

A Yes. In other words, in order to operate my

business --

Q Just answer the question.

A Beg your pardon?

JUDGE ROSSBACH: The answer is, yes.

Q Richard Warma, he was an employee of yours?

A No.

MR. ZASLAV: I object to that, Your Honor. That has nothing to do with this case.

JUDGE ROSSBACH: Overruled. You say he was not?

THE WITNESS: Never worked for me.

JUDGE ROSSBACH: Never?

THE WITNESS: No.

Q How long did you know Richard Warma?

A Oh, I'd say for six or seven years, maybe.

Q Six or seven years?

A Years.

Q And didn't he ever drive one of your tow trucks?

A No. I never knew he was old enough to drive.

Q Did he ever come to your shop?

A Yes.

Q And what did he do there, if anything?

MR. ZASLAV: I object once again. It's irrelevant to the charges of 3305, Your Honor.

JUDGE ROSSBACH: Overruled.

MR. ZASLAV: I respectfully except.

JUDGE ROSSBACH: What did he do there?

THE WITNESS: Well, since I known the kid for so long, since he was a little kid, my business -- if you don't mind --

MR. ZASLAV: Your Honor, may I request that the district attorney ask the question? It appears that -- I say, it appears that the questions are coming through a witness in this case and not through the district attorney.

JUDGE ROSSBACH: It doesn't appear so, to me. Overruled.

Will you repeat the question, Mr. Stenographer?

(The Court Reporter reads the last question back for the Court.)

JUDGE DELAGI: What is the rest of the

answer?

THE WITNESS: Beg your pardon?

JUDGE ROSSPACH: What did he do in the shop?

THE WITNESS: Oh, yes. Well, he never did anything. As the kid grow up, in and out; in other words, he come over, hang around. If I needed a pack of cigarettes or get a soda or something for me or stand around the shop. In other words, playing hooky from school; he stayed home, or rather came over to my shop and it was a chicken market before and he used to work there and he took attached to me and this is where I end up at. I've been knowing the kid since he was a baby.

Q Now, do you know if he has a driver's license or not?

A To my knowledge, no.

Q And isn't it a fact, that you lent him the car on several occasions, prior to --

A Never.

MR. ZASLAV: He answered that.

JUDGE ROSSBACH: Overruled.

MR. GARCIA: It's cross-examination.

Q And isn't it a fact that on that day you had lent him the car?

A No.

Q Didn't you state that they had showed you marijuana in your shop?

A The officers called me. I turned around and they showed me marijuana that he said he just got out of the bucket.

Q That was at your shop?

A That's at my shop. I didn't see it take it out.

Q Didn't you state after that --

A Yes.

Q -- that they showed you the marijuana at the station house?

A No. They never showed me marijuana at the station house.

Q Well, didn't you state that they had -- they would drop the charges against these boys and we'll drop this marijuana charge?

A That was at the shop, not at the station

house.

MR. GARCIA: Your Honor, I believe the record if it were read again would show --

JUDGE ROSSBACH: I'm afraid the record would not substantiate the district attorney.

Q When you got to the police station, it was about 11:30?

A I'd say later than that.

Q What time would you say it was?

A I'd say I was at the station house for approximately forty-five minutes.

Q Not how long you were there; what time did you get there, sir?

A I'd say about 12:15; 12:30, when the officers took me there.

Q At that time, were Mr. Richard Warme and a Mr. Rungo there already?

A They were there.

Q Was your car there also, at that time?

A My car was there, at that time.

Q And at that time, did you have a conver-

sation with the police officers?

A I had no conversation at all.

Q You didn't have a conversation with Detective Drummond?

A I didn't have a conversation with Detective Drummond or Detective Kilroy and I asked one word to the kid that stole the car, "Why did you do it." I could say no more and I was told to sit down.

Q And isn't it a fact that thereafter, you went with Detective Kilroy and with Detective Drummond to your shop?

A No.

JUDGE ROSSBACH: Where was your car? Let's see. The detectives brought you back to the precinct?

THE WITNESS: Yes, sir.

JUDGE ROSSBACH: And you say that your car was there, at that time?

THE WITNESS: My car was there, at that time.

JUDGE ROSSBACH: Parked outside of the precinct?

THE WITNESS: Parked outside the

precinct, between 178 and 177th Street. That's why later, I couldn't see how they lost the keys if they had the car there.

JUDGE ROSSBACH: What did they say about the keys?

THE WITNESS: Beg your pardon?

JUDGE ROSSBACH: what did they say about the keys?

THE WITNESS: While I was sitting there waiting for them to pay some attention to me about my car, the officer says, they took -- "Two officers took this Richard Warme out."

JUDGE ROSSBACH: Yes?

THE WITNESS: And he was supposed to be going to find the keys. So of course, by actually being upset, you don't think, and you see the car downstairs and now you say, where could he have thrown the keys. So I'm looking at the clock -- it's almost one o'clock -- and I decided I'm going back to my shop. I could be here all night.

Q Well, did you have some work to do at your

shop, at that time?

A Yes, I did. I had three nice jobs.

Q And do you usually work at one o'clock in the morning, in your shop?

A Sometimes I go forty-eight hours, sir.

Q And on this rainy night, you picked to go and work on a car in your shop?

A I didn't pick the night. I was working all day. I don't think I had four hours' sleep.

Q Well, you took time out at six o'clock to come to the police station to report the theft of your car?

A It was before six o'clock. I'd say it was about four-thirty, five o'clock; I called up prior to the station house, approximately four-thirty and they told me to report it in person.

Q And it wasn't that you talked to somebody on the way that told you your shop was opened and that there was some policeman in the shop?

A That was on my way back, approximately 1:10-1:15, on the 8th that morning.

Q Well, weren't you going back anyway to continue work on another car?

A That's right, but my shop was closed. I locked my shop up and left and go on over and these officers came and picked me up a -- to take me over there. I put a lock on it and put the key in my pocket. I had two keys for that lock. One key happened to have been on the car ring, key ring of the car that was stolen.

JUDGE ROSSBACH: Well, now, when did you miss the car keys?

THE WITNESS: Sir, I didn't miss the car keys until -- well, it was very late in the afternoon, in the afternoon, I should say, around four, four-thirty, something like that.

JUDGE ROSSBACH: You didn't know the car was gone until then?

THE WITNESS: No, I didn't. I was work -- it was raining hard that day. Of course, the rain had nothing to do with it. I was working.

JUDGE ROSSBACH: You didn't know the car was missing until then?

THE WITNESS: I did not.

JUDGE ROSSBACH: You immediately went down or shortly thereafter?

THE WITNESS: First thing I did --

JUDGE ROSSBACH: Tell us.

THE WITNESS: -- I called --

JUDGE ROSSBACH: Now, as far as you know, you still had those keys or --

THE WITNESS: No, I missed the keys; no.

JUDGE ROSSBACH: Where had you placed the keys?

THE WITNESS: I last placed the keys in the office. I have a little small office and I last placed the keys right there. There had been only one or two people in my shop that entire day because of the weather and two of them never came through the little side door. There was a school teacher and a postmaster and Warme and his friend came all the way through. I never forget. I

was working on one car back in the corner and the kid struck up a conversation and when I'm working, I don't want to be bothered and he left.

Q Weren't you also drinking that day?

MR. ZASLAV: Objection, Your Honor.

JUDGE ROSSBACH: Overruled.

Answer!

A I have a little drink everyday; sometimes, especially in bad weather.

Q . I'm asking you about November 7, were you drinking on that day?

A When you say "drinking" sir, I mean like what?

Q well, what do you drink?

A I drink a little flash of whisky.

JUDGE ROSSBACH: Well, now, we will continue this case 2:00 p. m. tomorrow. One of the judges doesn't quite feel up to par. Two p. m.

MR. ZASLAV: I only have one more witness.

JUDGE DELAGI: The People have several.

MR. GARCIA: The People have two more witnesses.

JUDGE ROSSBACH: All right, 2:00 p. m.

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The above is an accurate copy of the minutes in this case.

Louis F Lamb

Official Court Reporter

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Dat. Frederick Drummond	4			
" -Voir Dire	17	21	x	x
Dat. John P. Kilroy	29	31		
Jesse Roberts	39	47		

Case adjourned for a continuance to Jan. 17, 1964, at 2:00 p. m.

THE CRIMINAL COURT OF THE
CITY OF NEW YORK

- - - - - - - - - - - - - - - X

PEOPLE OF THE STATE
OF NEW YORK, :

-against- :

JESSE ROBERTS, :

Defendant. :

- - - - - - - - - - - - - - - X

Docket No.: A-5536.

Charge: 3305 P. H. L.

Date: January 17, 1964.

HELD AT: Part 2B,
900 Washington Avenue,
Bronx 51, New York.

BEFORE: HON. J. HOWARD ROSSBACH, Presiding Justice.
HON. AMBROSE J. HADDOCK, Associate Justice.
HON. NICHOLAS F. DELAGI, Associate Justice.

A P P E A R A N C E S :

ISIDORE DOLLINGER, Esq.,
District Attorney Bronx County,
By: LOUIS A. GARCIA, Esq.,
Assistant District Attorney.

JESSE GASLAV, Esq.,
Attorney for Defendant.

Herbert E. Moorehead, Jr.,
Official Court Reporter.

I N D E X

Witness	Dir.	Cross	Re-dir.	Re-cross	Ct.
Jesse Roberts	--	4	--	--	6
Jose Torres	10	14	17	--	--
Carl Toone	18	--	--	--	--
Joseph Hooks	21	--	--	--	22
Richard Warme	24	30	43,49	52	43,45, 48,50

Motions - End of Trial . . . . . pages 54-55.

Decision . . . . . page 56.

Motion to set aside judgment . . . . . page 56.

Court Reporter's Certification . . . . . page 57.

I N D E X

Witness	Dir.	Cross	Re-dir.	Re-cross	Ct.
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Carl Toone	18	--	--	--	--
Joseph Hooks	21	--	--	--	22
Richard Warme	24	30	43,49	52	43,45, 48,50

Motions - End of Trial . . . . . pages 54-55.

Decision . . . . . page 56.

Motion to set aside judgment . . . . . page 56.

Court Reporter's Certification . . . . . page 57.

COURT OFFICER: 5536, Jesse Roberts, 3305 of the Public Health Law; continued trial.

MR. GASLAV: The defendant, at this time, moves to exclude all witnesses, your Honor.

JUSTICE ROSSBACH: Yes, all witnesses in the continued case--Now, do you want witnesses who have testified?

MR. GASLAV: All witnesses, even though they have testified, if they are going to be recalled.

JUSTICE ROSSBACH: Yes.

MR. GASLAV: If they are not going to be recalled--

JUSTICE ROSSBACH: All witnesses who have not testified in the case on trial, leave the court room, remain outside, until recalled. And, counselor, will you check the audience for other witnesses who may reasonably be recalled?

MR. GASLAV: Yes, your Honor, there doesn't appear to be anybody.

JUSTICE ROSSBACH: All right.

MR. GASLAV: Take the stand.

JUSTICE DELAGI: The defendant is recalled, and you are under oath; sit down, please.

J E S S E R O B E R T S , recalled as a witness, being previously duly sworn, resumed the stand and testified further, as follows:

JUSTICE DELAGI: Your name and address?

THE WITNESS: Jesse L. Roberts, 850 East 161st Street.

MR. GARCIA: I just have two more questions, I think, your Honor.

JUSTICE DELAGI: Go ahead.

CROSS-EXAMINATION (CONT'D)

QUESTIONS BY MR. GARCIA:

Q Mr. Roberts, did you see Richard Warme at the police station, the 48th Precinct, on November 7, 1963?

A Yes, I did.

Q And did you have a conversation with him at that time, in the presence of the police officer?

A No, I did not.

Q And did Richard Warme work for you at any time?

A No, he did not.

Q And at no time did you pay him any money for any services whatsoever, is that correct?

A No, I have never paid him any money for services.

Q And, on November 7, isn't it a fact that you did lend him your car and asked him to go out and buy a pint of whiskey?

A No, I did not.

MR. GASLAV: Objection, your Honor.

JUSTICE ROSSBACH: Overruled.

Q And at what time did you see Richard Warme at the police station, I believe the 48th Precinct, on November 7, 1963?

A Approximately 12:15, 12:30.

Q And earlier, on November 7, had you seen him during the afternoon?

A I would say approximately shortly after 12:00 or so.

Q And did you not see him around 3 o'clock that afternoon of November 7?

A I did not.

MR. GARCIA: I have no further questions

at this time.

MR. GASLAV: I have no further questions, your Honor.

JUSTICE DELAGI: All right, step down.

JUSTICE ROSSBACH: Excuse me, I have a few.

EXAMINATION BY THE COURT

QUESTIONS BY JUSTICE ROSSBACH:

Q Now, did you ever have occasion to get Warme's Social Security number?

A No, sir.

Q Or, did you ever list him on any return with the Federal Government or State Government as an employee?

A No.

MR. GASLAV: Sir?

JUSTICE ROSSBACH: What?

MR. GASLAV: May I ask that before you ask the defendant to answer these questions, that you advise him of his constitutional rights?

JUSTICE ROSSBACH: Well, you can do it, you are his lawyer.

MR. GASLAV: Well, I'm asking through the Bench, sir; it's the duty of the Court to advise him of his constitutional rights.

JUSTICE ROSSBACH: No, he is--

JUSTICE DELAGI: His character is in evidence now, he has taken the stand.

JUSTICE ROSSBACH: Yes.

MR. GASLAV: Yes, sir.

JUSTICE ROSSBACH: However, I'll say that counsel is at perfect liberty--

JUSTICE DELAGI: To advise him.

JUSTICE ROSSBACH: --to advise him, and I'll allow counsel to stand by him.

MR. GASLAV: For the record, at this time I would like to advise my client that he has a right, under the United States Constitution, to refuse to answer these questions, on the grounds that it may injure his rights; in other case, I'm also advising him to answer these questions.

JUSTICE ROSSBACH: All right, do you understand that thoroughly?

THE WITNESS: Yes.

Q (By Justice Rossbach) Now, what's the answer, did you ever put Mr. Warme's name on any return to the United States Government, yes or no?

A No, sir.

Q To the State of New York?

A No, sir.

Q Did you ever put his name on any writing, to your knowledge?

A Well, I can say this, your Honor, I loaned the kid $25.00 one time, I don't know if I made it out in a check form, for cash or put his name down.

Q And what was this, this was a loan?

A This was a loan, which I never got paid for.

Q And when did you make this loan?

A Oh, it's very difficult to say, but sometime, I would say, in 1963, the latter part of the summer.

Q Now, this was kind of a large sum to loan to a young boy, wasn't it?

A Yes, it is.

Q Did you get any note from him?

A Absolutely no note at all; he was telling me about his marital difficulties, and he was going to have a job

doing paint work, he was supposed to be a painter, you know, fixing up the walls on buildings, and the moment, in fact, this money--

Q Now, he was married?

A According to him he was married.

Q And yet you felt he was not old enough to drive a car?

A No, sir.

JUSTICE ROSSBACH: All right, I have nothing else.

JUSTICE DELAGI: All right, step down.

MR. GASLAV: I have no further questions.

JUSTICE ROSSBACH: All right, before we-- We now have the interpreter, we will take about a minute break here and recall that woman's case.

JUSTICE DELAGI: All right, Roberts, you may sit down.

(A short recess was taken at this time.)

COURT OFFICER: Recall of Jesse Roberts, continued trial.

MR. GASLAV: Call Joseph Torres.

COURT OFFICER: What's his name?

MR. GASLAV: Joseph Torres. There is another witness in here, your Honor, may I ask to exclude him?

JUSTICE DELAGI: The People's witness, here.

MR. GARCIA: Detective Drummond, will you wait outside?

JUSTICE DELAGI: Raise your right hand.

J O S E T O R R E S , called as a witness, being first duly sworn, testified as follows:

JUSTICE DELAGI: Sit down, please; what is your name?

THE WITNESS: Jose Torres.

JUSTICE DELAGI: Where do you live, Mr. Torres?

THE WITNESS: 2029 La Fontaine Avenue.

JUSTICE DELAGI: Bronx?

THE WITNESS: Yes.

DIRECT EXAMINATION

QUESTIONS BY MR. GASLAV:

Q What is your business or occupation, Mr. Torres?

A My business?

Q Yes.

A I work for Horn and Hardart.

Q How long have you worked for them?

A Twelve years.

Q How many?

JUSTICE ROSSBACH: Twelve years.

A Twelve.

Q Have you ever been convicted of a crime?

A No, sir.

Q Have you ever been arrested?

A No, sir.

Q Do you know the defendant, Jesse Roberts?

A Yes, sir.

Q And for what period of time do you know him?

A Three or four years.

JUSTICE ROSSBACH: Counsel, Station A, otherwise this man will just whisper and I can't hear him.

MR. GASLAV: Is this A, Judge?

JUSTICE ROSSBACH: Yes, that's Station A, really A prime.

MR. GASLAV: Excuse me.

Q Do you recall where you were on the night of November 8, 1963, at approximately 1:00 A.M.?

A Yes, sir.

Q Will you tell the Court under what circumstances and where you were at that hour?

A At that time I coming to move the car one side to another. When I vet to the car, I make around the block, I see some lights on--

JUSTICE ROSSBACH: You see what?

JUSTICE DELAGI: Some lights on.

A --and people in the shop, you know?

JUSTICE DELAGI: In the repair shop, a paint shop?

THE WITNESS: Yes. And then I come in, I park the car the right side and I saw Mr. Roberts coming up; I ask him, "What you doing, you have the shop open with people inside", he said, "No, my shop is open--is closed", and that's it; I said, "Okay, I see you"; I go upstairs to go to sleep.

Q Do you recall what the weather conditions were

on that night?

A It was raining.

Q Are you able to identify any of the people that were in the shop?

A No, sir.

Q Do you remember how many people you saw in there?

A I saw one, two, three, I don't know; I don't stop, you know, I saw some people.

Q In other words, was Jesse Roberts in a car at this time?

A Pardon me?

Q Was Jesse Roberts in a car at this time?

A In the car?

JUSTICE DELAGI: Was he in an automobile?

THE WITNESS: No, he was walking.

JUSTICE DELAGI: He was walking on La Fontaine or somewhere else?

THE WITNESS: He walked 178th to 179th, where his shop is.

Q Was he with anybody?

A No, sir.

Q He was by himself, and you are sure of this,

right?

A Yes.

MR. GASLAV: I have no further questions.

CROSS-EXAMINATION

QUESTIONS BY MR. GARCIA:

Q And this was on the night of November 8, is that correct?

A Yes, sir.

Q About what time?

A Around 1 o'clock.

Q 1 oclock?

JUSTICE DELAGI: 1:00 A.M.?

THE WITNESS: In the morning.

Q This was the morning, then?

A Yes, sir.

Q Did you look at your watch at that time?

A No, I don't look the watch because I come down with the late show finish, it's about 1 o'clock, I watch the show.

Q And what time did you get home from work on November 7?

A I was off that day.

Q You were off all November 7?

A I was--Thursday and Friday.

Q And you didn't move your car before this time, did you?

A No, because the next day, early morning, I come out to move the car.

Q How far away from 2029 La Fontaine Avenue was your car?

A My car? My car was in front of the house, but I have to move it the other side.

Q It was right in front of the house?

A Yes, I parked it right in front of the house.

Q And that's where you saw Mr. James--Mr. Roberts?

A Yes, sir.

Q In front of the house?

A In front of my house.

Q Next to his shop?

A (Nods affirmatively).

Q Was the shop next to you or across the street?

A Across the stree, on the other side, on the corner.

Q Is that where you saw Mr. Roberts?

A No, I saw him on the sidewalk, on the right sidewalk, park the car.

Q Well, you had the car in front of your house, you were going to park it on the other side of the street, weren't you?

A No, I park on the right side.

Q And where was Mr. Roberts when you were in your car?

A He come up to 178th.

Q Well, he wasn't in front of your building, then?

A Oh, he meet me in the car, when I was park the car, I was ready to park the car.

Q And how far away from his store was that?

A Pardon me?

Q How far away from his store was that?

A It's not far away, I don't know how many feet away, but it's not far away.

Q Is it on the same sidewalk as his store?

A No, the other side.

Q The other side, and you don't know if he had come out of his store at that time, do you?

A No, I saw him coming up, I don't know where

he was coming from.

Q You don't know if he had been in the store all this time?

A No, he told me he had found his car.

Q He didn't tell you where he was coming up or had been coming from the store?

A (Nods negatively).

Q He didn't tell you that?

A (Nods negatively).

Q So, from your own knowledge, you don't know whether he had been at the store a few minutes earlier, right?

A No.

MR. GARCIA: I have no further questions.

REDIRECT EXAMINATION

QUESTIONS BY MR. GASLAV:

Q Mr. Torres, which--in which direction was he walking?

A Walking up towards 179th.

Q Going towards the store?

A Yes.

MR. GASLAV: No further questions, your

Honor.

JUSTICE ROSSBACH: All right, step down.

MR. GASLAV: Carl Toone.

JUSTICE ROSSBACH: All right, the other witnesses who testified, remain outside; Mr. Torres, would you mind staying outside?

JUSTICE DELAGI: Raise your right hand.

C A R L T O O N E , called as a witness, being first duly sworn, testified as follows:

JUSTICE DELAGI: Sit down, please; your name and address.

THE WITNESS: Carl Toone, 755 Forest Avenue.

DIRECT EXAMINATION

QUESTIONS BY MR. GASLAV:

Q Mr. Toone, how long--What is your business or occupation?

A Auto wrecker.

Q And how long have you know the defendant, Jesse Roberts?

A Oh, about five years.

Q And what do you know of his reputation in the

community?

MR. GARCIA: I'll object to that question.

JUSTICE ROSSBACH: Well, sustained.

JUSTICE DELAGI: Did you ever hear anything--

Q Did you ever hear anything good or bad of him?

A From what I know of him, he is a hard-working man; I don't know nothing bad about him.

Q Have you ever seen him get drunk or anything of that nature?

A No, I never have.

Q Have you ever seen him run around with women?

A No.

Q Did you ever see him smoking marijuana?

MR. GARCIA: I object.

JUSTICE ROSSBACH: Sustained.

Q Have you ever heard anything good about him in the community from others?

MR. GARCIA: I object to the form.

JUSTICE ROSSBACH: Well, then, you will have to--If you will permit me, sustained. Do you know other people who know him in the neighborhood?

THE WITNESS: Yes, I do.

JUSTICE ROSSBACH: Have you talked to them about his reputation?

THE WITNESS: Well, I mean, the people that I know that knows him they know him the same as I do.

JUSTICE ROSSBACH: Then, you have talked to these people about Mr. Roberts' reputation, is that right?

THE WITNESS: No, I haven't talked to them about it.

JUSTICE ROSSBACH: The objection is sustained.

MR. GASLAV: I have no further questions.

MR. GARCIA: I have no questions.

MR. GASLAV: Joseph Hooks.

COURT OFFICER: Who?

MR. GASLAV: Joseph Hooks.

JUSTICE DELAGI: Raise your right hand.

J O S E P H H O O K S , called as a witness, being first duly sworn, testified as follows:

JUSTICE DELAGI: Sit down; your name and

address?

THE WITNESS: Joseph Hooks, 159-44 Harlem River Drive.

DIRECT EXAMINATION

QUESTIONS BY MR. GASLAV:

Q What is your business or occupation, sir?

A I beg your pardon?

Q What is your business or occupation?

A I'm an auto-mechanic.

Q And do you know this defendant, Jesse Roberts?

A Yes, I do.

Q And how long do you know him?

A About ten years.

Q Have you ever spoken to anybody pertaining to his reputation in the community, have you ever had any conversation with anybody?

A In what community?

Q As to Mr. Roberts's reputation in the community, have you ever spoken to anybody?

A No.

Q What is your personal knowledge of his reputation?

MR. GARCIA: I'll object, your Honor.

JUSTICE ROSSBACH: Yes, I'll have to sustain it.

Q Have you ever heard anything good or bad pertaining to his--

JUSTICE DELAGI: You can ask him if he ever heard anything bad.

Q Have you ever heard anything bad of his character in the neighborhood?

A Never.

Q Have you ever heard anything good?

A Yes.

MR. GARCIA: I object.

MR. GASLAV: No further questions.

JUSTICE ROSSBACH: Any questions?

MR. GARCIA: No questions.

JUSTICE ROSSBACH: Oh, I got a question.

EXAMINATION BY THE COURT

QUESTIONS BY JUSTICE ROSSBACH:

Q For whom do you work?

A Now, at present?

Q Yes.

A I work for the Muffler King, Incorporated.

Q Did you ever work for Mr. Roberts?

A Yes.

Q When?

A During the years from 1958 to 1960.

Q Did you ever see Warme, a fellow named Warme, in the shop?

A Warme?

Q Yes, a young man.

A Not by the name, maybe by the face.

JUSTICE ROSSBACH: All right.

JUSTICE DELAGI: Step down, please.

MR. GASLAV: At this time, your Honor, the defendant rests.

MR. GARCIA: At this time, your Honor, the People will offer, in rebuttal, to call Richard Warme to the stand.

JUSTICE DELAGI: Raise your right hand, young man.

R I C H A R D W A R M E , called as a witness, being first duly sworn, testified as follows:

JUSTICE DELAGI: Sit down; what is your name?

THE WITNESS: Richard Warme.

JUSTICE DELAGI: Where do you live?

THE WITNESS: 2011 La Fontaine Avenue.

JUSTICE DELAGI: Bronx?

THE WITNESS: Bronx 57, New York.

JUSTICE DELAGI: All right, Mr. Garcia.

DIRECT EXAMINATION

QUESTIONS BY MR. GARCIA:

Q Mr. Warme, do you know the defendant, Jesse Roberts?

A Yes, sir.

Q How long have you known him?

A About four or five years.

Q And have you ever worked for him?

A Yes, sir.

Q What period of time did you work for him, Mr. Warme?

A Well, I worked on and off with Jesse Roberts.

Q And in 1963, how long did you work for him?

A Altogether? About eight, nine months.

Q Do you recall what your salary was?

A Well, half the time he didn't have any money to pay me, and I was giving him a hand there and when he made money I made money.

Q And what were your duties?

A Well, I was chasing for him.

MR. GASLAV: I move to strike that out, your Honor.

JUSTICE ROSSBACH: Yes, strike out the word "chasing".

Q What were your duties in connection with Mr. Roberts' business?

A Well, I worked in his body shop.

Q Doing what?

A Stripping cars.

Q And what else, if anything?

A I was driving his car.

JUSTICE HADDOCK: Tow car?

THE WITNESS: No, the car, spotting out for him.

Q Well, exactly what did you do?

A Well, I used to spot out on a corner, say Boston

and Prospect, and he used to relay to me if something came over the radio.

MR. GASLAV: I move to strike it out, your Honor.

MR. GARCIA: It's a conversation with the defendant.

MR. GASLAV: It has nothing to do here; that prejudicial to this defendant; the charge here is 3305.

(At this point, the Justices conferred among themselves.)

JUSTICE ROSSBACH: All right, the objection is overruled. Go ahead.

MR. GASLAV: I respectfully except, your Honor.

Q What else did you do for the defendant?

A Well, that's how I have to explain that I had been working for him.

Q What else did you do, if anything?

A Well, I used to talk to customers, get him the job, sign him up.

Q And what was your payment for that?

A Well, he used to give me $10.00, if I get the job, plus whatever I made in the shop.

JUSTICE DELAGI: Did you get a weekly salary?

THE WITNESS: No, sir.

JUSTICE DELAGI: How did he pay you?

THE WITNESS: If I worked a week he would give me a weekly salary.

JUSTICE DELAGI: How much?

THE WITNESS: Fifty, $60.00.

JUSTICE DELAGI: How were you paid?

THE WITNESS: Sometime by check and most the time by cash; once I think he paid me by check.

JUSTICE DELAGI: Go ahead.

JUSTICE ROSSBACH: What did you say?

JUSTICE DELAGI: Once he thinks he paid him by check.

JUSTICE DELAGI: How much was that for?

THE WITNESS: I think it was about $40.00.

Q Now, on November 7, 1963, were you at the 48th Precinct?

A Yes, sir.

MR. GASLAV: This is without the scope of rebuttal, your Honor.

JUSTICE ROSSBACH: Overruled.

MR. GASLAV: I respectfully except.

Q And what time did you arrive there?

A About 11 o'clock.

Q And, at that time and place, did you see the defendant, Mr. Roberts?

A No, sir.

Q Well, did you see him that night of November 7, at the 48th Precinct?

A Yes, sir.

Q What time?

A Well, he came in after I was already locked up.

Q And do you recall the time?

A Excuse me?

Q Do you recall the time?

A Not exactly. Well, not too long after I was there he came in.

Q Now, at that time, were Detectives Drummond and Kilroy present?

MR. GASLAV: I'll renew the objection, your Honor, it's without the scope of rebuttal witness.

JUSTICE ROSSBACH: Overruled.

Q And did you have a conversation with the detectives in the presence of defendant?

A Yes, sir.

Q What was that conversation?

A I told them that after he said that I stole the car, he had pointed to me, he said, "That's the man", I says, "You are a liar; you lent me the car", I said, "you know".

Q And what did he say to that, if anything?

A He didn't say nothing, he just shook his head; I think he was drinking that night.

Q And what else--what other conversation did you have in his presence?

A Well, I told the detective that he had marijuana in the shop.

Q And what did the defendant say to that?

A He said I'm a liar, that I'm a liar; he said, "Go ahead, check my shop".

Q And, then what happened?

A And then the detectives left with him to check his shop.

Q Do you remember what detective left with him?

A I know it was three detectives that left with him.

MR. GARCIA: Your witness.

CROSS-EXAMINATION

QUESTIONS BY MR. GASLAV:

Q Mr. Warme, you don't like the defendant, do you?

A Excuse me?

Q You don't like that defendant, do you?

A I always liked the defendant.

Q Well, you turned him in on a marijuana charge, on radio bulletins and guns, so you couldn't like him too much, could you?

A Well, I borrowed the car off of him, also.

Q I'm not talking about the past, I'm talking about right now, you don't like him, do you?

A Right now?

Q Yes.

A No.

Q And you have been talking to the detectives about him for about two months now, is that right?

A No, sir.

MR. GARCIA: I object to that question.

JUSTICE ROSSBACH: Overruled.

MR. GASLAV: Will you read it back?

JUSTICE ROSSBACH: And you have been talking to the detectives about him for two months now, is that right?

A No, sir.

JUSTICE DELAGI: He said no.

Q Do you know any of the detectives involved in this case?

A I know them by sight.

Q Just by sight?

A Yes.

Q Which one do you know by sight?

A Detective Kilroy.

Q Just by sight, is that it?

A (Nods affirmatively).

Q Is he the one that locked you up?

A Excuse me?

Q Is he the one that locked you up?

A Yes, sir.

Q And where did he find you before he locked you up?

A I turned myself in.

Q What do you mean by that?

A Well, I went down to the bowling alley with my friend and they told us that the police were looking for us.

Q Is this the first time you have been in that police station?

A No, I have been in it once with Jesse Roberts.

Q You never been there before?

MR. GARCIA: I'll object, your Honor.

JUSTICE ROSSBACH: Overruled.

A No, sir.

Q Have you ever been there before?

A No, sir.

Q Have you ever been in any other police station before?

A No, sir.

Q Well, you have a record, you have been locked up a couple of times, haven't you?

A No, sir.

MR. GARCIA: I object to the form of the question, your Honor.

JUSTICE ROSSBACH: Yes, sustained as to form.

Q You have never been locked up?

MR. GARCIA: I object to that question, your Honor.

JUSTICE ROSSBACH: Sustained.

Q What if I tell you Detective Kilroy testified you have been in trouble before, what would you say to that?

MR. GARCIA: I object to that, your Honor.

JUSTICE ROSSBACH: Yes, sustained; that's not our recollection--

A The only time--

MR. GARCIA: Objection. You don't have to answer the question.

Q Let me ask you this, when did you first see this marijuana in Jesse Roberts' place?

A Well, he had a deal with some other guy.

Q I didn't ask you that, I asked you when did you first see it?

A A number of times.

Q When?

A The exact day?

Q What month, what year?

A November.

Q Did you see it before November?

A I'm not sure.

Q Well, you just said you saw it a number of times.

A Well, I meant in November.

Q Well, this was November 8th, how many days before did you first see it?

A Well, he had it in the store; if he took it out a couple of times he was talking to a guy, he had someone holding it for him, I seen it.

JUSTICE ROSSBACH: What? You see, Counsel, if you will be there, the witness will talk low.

MR. GASLAV: I'm sorry, sir.

JUSTICE ROSSBACH: What did you say?

THE WITNESS: I said, I seen it a number of times. I seen two guys that he had in the shop one night, rolling it, and putting it into a bag; he even offered me if I wanted a cigarette. He said the next one would cost me a dollar, and I refused it.

Q Do you know to possess marijuana was against the law?

A Yes, sir.

Q Why didn't you turn him in then?

A Because Jesse Roberts was a friend of mine.

Q He did what?

A He was a friend of mine.

Q Well, isn't he a friend of yours any longer?

A No, sir.

Q And what about this alleged radio that you spoke about, didn't you know that's a crime, too?

A Yes, sir.

Q In other words, it's all right for you to commit a crime until somebody turns you in and then you turn them in?

MR. GARCIA: I object, your Honor, to the question.

JUSTICE ROSSBACH: Yes.

Q Do you have any means of proving to this Court that you worked for Jesse Roberts?

MR. GARCIA: I'll object, your Honor.

JUSTICE ROSSBACH: No, I think that's a very fair question.

THE WITNESS: Well, I have a number of people that know I worked for Jesse Roberts.

Q Do you have them in court today?

A No, sir.

Q Well, how old is this case and how many times have you been in court?

A Excuse me?

Q How many times have you been in court on this case?

A Once.

Q This is the first time you have been here?

A Yes, sir.

Q Excuse me?

A Yes, sir.

Q You have never been in case--in court on this case before?

A On my own case.

Q On this case, how many times have you been here, on Jesse Roberts' case?

A Yesterday and today.

Q You had never been here before?

A No, sir.

Q Weren't you in Part 1A about three weeks ago?

A On Jesse Roberts' case?

Q On Jesse Roberts' case.

A In this court?

Q In this court.

A I only came in once in this court when Jesse Roberts was locked up; that's the only time I came in with him, and yesterday and today.

Q Will you tell the Court how you know what marijuana looks like?

A Well, he told me what--he had people in there--

Q Excuse me?

A I know what marijuana looks like.

Q Well, how do you know that?

A Because he showed me.

Q Jesse showed you?

A Yes.

Q Well, you said he only had it there about a day before.

A I didn't say he had it there only about a day before, I said I seen it a number of times.

Q Well, how many days did he have it?

A I said I seen it a number of times.

Q And I suppose you saw him smoking it, right?

A That's right, Jesse was smoking it.

Q What about the stuff he rolled, where is that, where is the contents of the cigarettes?

A All I know is he had a bag and he had two Puerto Rican guys rolling it up for him one night while me and him were listening to a police radio.

Q And where did he keep it?

A On the bottom of a pot-bellied stove.

Q Did you tell that to the police?

A Yes, sir.

Q And how old are you, Mr. Warme?

A Excuse me?

Q How old are you?

A Seventeen.

Q And what school are you attending?

A Junior High School 118.

Q What is that?

A Junior High School 118.

Q Are you presently in attendance there?

A Excuse me?

Q Are you presently in attendance there?

A Now, am I going to school?

Q Yes.

A No, sir.

Q Well, what did you tell me you were going to 118 or 119, whatever it was?

A I thought you mean what school I presently go to.

Q How long ago did you drop out?

A Since I was 16.

Q What have you been doing since then?

A Been working.

Q Doing what?

A I been painting just now.

Q Doing what?

A Just recently I have been painting.

Q What have you been doing since the time you were 16 and you painting presently?

A I was working with Jesse Roberts.

Q But you just said if he didn't make any money you didn't make any money.

A I just said when he was working, if he made money, I made money.

Q Had you ever spoken with Detective Kilroy prior to this time?

A No, sir.

Q You never had any conversation with him?

A I don't understand what you are talking about.

Q Excuse me?

A I don't understand what you are talking about.

JUSTICE ROSSBACH: It's a very simple question, and it's a very fair question; had you ever spoken to Detective Kilroy before the eighth of--or the seventh of November, 1963, yes or no?

THE WITNESS: Yes.

JUSTICE ROSSBACH: All right, the answer is yes.

Q Under what circumstances?

MR. GARCIA: Objection, your Honor; it's immaterial to this case.

JUSTICE ROSSBACH: Overruled; we will take it, subject to connection.

JUSTICE HADDOCK: What was the reason for talking with him?

THE WITNESS: Excuse me?

JUSTICE HADDOCK: What was the reason you spoke to him before?

THE WITNESS: Well, he had told me to come to court on January 8th--I mean--

JUSTICE DELAGI: No, this is before the arrest of Roberts; you are being asked, did you ever speak to Kilroy before that?

THE WITNESS: Oh, no, sir.

JUSTICE ROSSBACH: Are you sure?

THE WITNESS: Positive.

JUSTICE ROSSBACH: That's before the night you were arrested for larceny of Roberts' car,

did you ever talk to Kilroy before?

THE WITNESS: The night before I was arrested?

JUSTICE ROSSBACH: Yes.

THE WITNESS: No.

Q And you don't know any of the other detectives involved here, right?

A Just by sight.

Q Were you ever present in a conversation in a police station where they asked the defendant, Jesse Roberts, to withdraw the charges against you?

JUSTICE ROSSBACH: Drop the charges.

THE WITNESS: No, sir.

Q You never heard any conversation like that, right?

A No, sir.

Q And, is it true that you have a reputation in the precinct of being a police informer?

MR. GARCIA: I'll object to that.

JUSTICE ROSSBACH: Yes, sustained.

A I have no reputation--

JUSTICE ROSSBACH: Sustained.

REDIRECT EXAMINATION

QUESTIONS BY MR. GARCIA:

Q Have you ever been convicted of any crime?

A The only crime was with his car.

Q Were you convicted for that crime?

A No, sir.

MR. GARCIA: I have no further questions.

MR. GASLAV: I have none.

JUSTICE ROSSBACH: Wait a minute.

EXAMINATION BY THE COURT

QUESTIONS BY JUSTICE ROSSBACH:

Q Now, you worked for eight or nine months with Roberts?

A Yes.

Q Did you work every day?

A No, sir, but I was around almost every day.

Q Half the days during these eight or nine months?

A Yes, sir.

Q Now, who else worked in the shop during that period?

A Well, he had another fellow there.

Q What's his name?

A Ralph.

Q And how long did Ralph work?

A Like me, he waz working on and off, also.

Q What's Ralph's last name?

A I don't know.

Q Is he still working with Roberts, as far as you know?

A I don't know, sir.

Q Now, do you have a Social Security number?

A Yes, sir.

Q Did you ever give that Social Security number to Mr. Roberts?

A Well, he was paying me off the books.

Q What?

A He was paying me without taking out any money.

Q So, you didn't give it to him, is that right?

A No, sir, he never asked me for it.

Q Now, had you worked for Mr. Roberts before 1963?

A Yes, sir.

Q And had you been paid for that work?

A Yes, sir.

Q And had you been paid by check?

A Just once.

Q When was this, that was in '63, is that right?

A I'm not sure.

Q Did he ever lend you any money?

A No, sir.

Q Did he ever lend you $25.00?

A No, sir; anything I made I worked for it; he was just trying to teach me the trade.

Q All right, now, just wait. If there is no question don't you make an answer.

JUSTICE ROSSBACH: I have no other questions.

JUSTICE DELAGI: Excuse me, I have a question.

EXAMINATION BY THE COURT

QUESTIONS BY JUSTICE DELAGI:

Q Were you in that car, Mr. Roberts' car up on Pelham Parkway?

A Yes, sir.

Q What time were you there?

A About--It's about 6 o'clock.

Q You say he gave you permission to go up there with the car?

A Yes, sir, he gave me $2.00 to go buy a half a pint of whiskey.

Q Where?

A On Tremont Avenue.

JUSTICE ROSSBACH: What time?

Q What were you doing on Pelham Parkway?

A Well, I took his car and I figured I could go up to Pelham Parkway before I came back down to his shop; he never minded.

Q That's quite a distance from his shop, isn't it?

A Yes, but he don't mind when I take the car; he never said anything before.

Q You say he told you to go out and buy a pint of whiskey?

A Half a pint of whiskey.

Q He gave you $2.00?

A That's right.

Q And where were you supposed to go to get that, on Tremont?

A Yes.

(At this point, the Justices conferred among themselves.)

JUSTICE HADDOCK: Is your larceny charge finished or still pending?

THE WITNESS: Excuse me?

MR. GASLAV: I object to that question, your Honor.

JUSTICE HADDOCK: Well, we have to find it out. Is there a charge of auto larceny pending against you now?

THE WITNESS: Yes, sir.

JUSTICE ROSSBACH: You are warned that you need not answer any question if the answer might tend to incriminate you; do you understand that?

THE WITNESS: I never been in court before, your Honor; I'm not familiar.

JUSTICE DELAGI: Well, do you understand what the Judge just told you?

JUSTICE ROSSBACH: Do you understand?

THE WITNESS: No, sir.

JUSTICE ROSSBACH: Look, I'm afraid--

MR. GARCIA: May I ask him a question, your Honor, please?

JUSTICE ROSSBACH: No, this is the Court's responsibility, not the D.A.

MR. GARCIA: I request the Court to ask that question again.

JUSTICE ROSSBACH: Well, I'm going to do it my way.

EXAMINATION BY THE COURT

QUESTIONS BY JUSTICE ROSSBACH:

Q Now, you have got a charge of stealing a car against you, do you understand that?

A Yes.

Q In fact, you told me that that's so.

A Yes.

Q And it's still open, is that right?

A I mean the case was out of court, it's finished.

Q Oh, it's finished?

A Yes.

Q It's no longer in court?

A No, sir.

JUSTICE ROSSBACH: All right, then we don't have to warn him.

MR. GARCIA: That's exactly what I tried

to tell you, your Honor.

(At this point, the Justices conferred among themselves.)

JUSTICE ROSSBACH: Well, nevertheless, it's very hard for a court, flying blind. You understand, if a question, to make you guilty of a crime or tends to show that you committed a crime, you can refuse to answer it on that grounds, do you understand that?

THE WITNESS: Yes, sir.

JUSTICE ROSSBACH: Regardless of the pending case, do you understand that?

THE WITNESS: Yes, sir.

JUSTICE DELAGI: All right, Mr. Garcia.

REDIRECT EXAMINATION (CONT'D)

QUESTIONS BY MR. GARCIA:

Q Were those charges dismissed?

A Yes, sir.

Q Are you on probation or anything?

A No, sir.

MR. GARCIA: I have no other questions.

JUSTICE ROSSBACH: I'm sorry, I have a question.

EXAMINATION BY THE COURT

QUESTIONS BY JUSTICE ROSSBACH:

Q Now, at 3 o'clock you were given this money to get the whiskey, right?

A Yes, sir.

Q And it was 3 o'clock, is that correct?

A Exactly ten after 3:00.

Q Exactly ten after 3:00. All right, when-- And you were supposed to bring it back to the automobile shop, isn't that right?

A Yes, sir.

Q Now, what time did you get back to the automobile shop, with the whiskey?

A I didn't come back.

Q Why not?

A The car got stuck up on Pelham Parkway and I tried to call the shop several times, but there was no answer, and I came back home and there was nobody in the shop, so I went upstairs--

Q What time did you get back to the shop?

A It was about 9:30.

Q So, it took you from--When did the car get stuck?

JUSTICE DELAGI: 3 o'clock.

Q When did the car get stuck, what time?

A Right after I took it up to Pelham Parkway.

JUSTICE DELAGI: About half past 3:00?

THE WITNESS: No. Well, I went up and I seen somebody first and I stayed up there for about two or three hours and then I went back down to start the car and it wouldn't start, and that was about 6 o'clock.

JUSTICE DELAGI: Just where on Pelham Parkway was the car stopped?

THE WITNESS: Easchester Road and--Wait a minute, yes, Eastchester Road.

JUSTICE DELAGI: Is it on Pelham Parkway north or south?

THE WITNESS: South.

JUSTICE DELAGI: On the service road--Eastchester Road, was it near the hospital?

THE WITNESS: Yes, sir, one block from

the hospital.

JUSTICE DELAGI: You left it in front of the hospital?

THE WITNESS: No, sir, in front of 1560 Pelham Parkway.

JUSTICE DELAGI: What's there, an apartment house?

THE WITNESS: Yes, sir.

JUSTICE DELAGI: Who lives there, anyone you know?

THE WITNESS: I have a friend who lives there.

JUSTICE DELAGI: Go ahead.

MR. GARCIA: I have no further questions.

JUSTICE DELAGI: All right.

RE-CROSS-EXAMINATION

QUESTIONS BY MR. GASLAV:

Q Mr. Warme, you mentioned that the detective left a message for you at where?

A I'm not sure who left the message, also I found out that the police were looking for us.

Q Now, do you have any idea in your mind how the police knew where to go to look for you?

A It's obvious, me and my friends, we are always on Tremont Avenue; we go bowling.

Q They don't know you, you can be on Tremont Avenue for a long time, they don't know you?

A He left the name of the station house, I guess, Richard Warme.

Q How did they know to go there to leave your name?

MR. GARCIA: I object.

JUSTICE ROSSBACH: Yes, how can he answer that?

MR. GARCIA: Don't answer it.

MR. GASLAV: No further questions, your Honor.

JUSTICE DELAGI: Step down.

JUSTICE ROSSBACH: Step down.

THE WITNESS: Thank you.

MR. GARCIA: The People rest.

MR. GASLAV: The defendant rests.

JUSTICE ROSSBACH: All right, motion.

MR. GASLAV: If your Honor pleases, at this time, the defendant moves to dismiss

on the grounds the People have failed to establish the guilt of the defendant beyond a reasonable doubt.

JUSTICE ROSSBACH: All right, we want to confer in Chambers.

MR. GASLAV: I would like to be heard on motions, sir.

JUSTICE ROSSBACH: All right.

MR. GASLAV: I would like to point out, for your edification, I'm sure that all you gentlemen have the point, that testimony began here to the effect that, I believe it will bear me out in the record, Detective Drummond testified that he went out and arrested the boy. Detective Kilroy testified that he left a message for him. Detective Kilroy testified that he knows this boy for a number of years, knew where he hung out, knew him very well. This boy just got off the stand and testified that he just knows him by sight; he never had a conversation with him. Now, I would like to go one

step further, your Honor, and indicate that this defendant, as a citizen of this Country, walked into a police station and made a complaint, and since that day, what took effect after that, is something that Hitchcock could not dream up in his wildest dreams. He has been in court here, he has been practically torn apart with charges of radio, tow truck, bulletins, guns, narcotics, practically everything that could be thrown at him up to that point, and I say the man has a right to a trial in this Court; he is a citizen in the community, your Honor, he is a credit to his race and a credit to the community, and if there is one iota of doubt in the testimony here, I implore you that you resolve it in his favor.

JUSTICE ROSSBACH: All right, we will reserve decision.

(At this point, the Justices retired to Chambers to deliberate.)

JUSTICE ROSSBACH: Incidentally, I don't see it here, but there was a plea of not guilty, I assume.

MR. GASLAV: Yes, sir, it was entered at the beginning of the trial.

JUSTICE ROSSBACH: All right, by a unanimous Court, I'm sorry for the defendant, to say that he is found guilty.

MR. GASLAV: I respectfully except, your Honor. At this time, the defendant moves to set aside the judgment as contrary to the facts in the case.

(At this point, the Justices conferred among themselves.)

JUSTICE ROSSBACH: Motion denied. He has no prior narcotics--

MR. GASLAV: No prior record at all, your Honor.

JUSTICE ROSSBACH: All right, sentence about two weeks; today is the 17th, the 31st, Friday, the 31st. If you make it any

earlier, they don't have the fingerprints. I'll make it three weeks, if you would rather.

MR. GASLAV: The 31st is all right, Judge.

JUSTICE ROSSBACH: All right, bail or parole continued.

MR. GASLAV: Would your Honor continue bail, please?

JUSTICE ROSSBACH: Yes, bail continued.

* * * *

Certified to be a true and correct transcript of the minutes in this trial.

Herbert C. Moorehead
Official Court Reporter

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CRIMINAL COURT OF THE CITY OF NEW YORK
PART 2B, BOROUGH OF THE BRONX

- x

THE PEOPLE OF THE STATE OF NEW YORK :

- against - :

JESSE ROBERTS : Docket No.5536

Defendant : Charge: 3305 of the Public Health Law.

- x

January 31, 1965

B e f o r e :

HONORABLE NEAL P. BOTTIGLIERI
HONORABLE JOHN B. LEE
HONORABLE MAX BLOOM

Judges

A p p e a r a n c e s :

CARMINE LO BOSCO, ESQ.
Assistant District Attorney
(For the People)

JESSE LEASSAV, ESQ.
217 Broadway
New York, N.Y.
(For the Defendant)

Doris Mayer, C.S.R.
Official Court Reporter

COURT OFFICER: For sentence, Docket Number 5536, Jesse Roberts.

MR. LEASSAV: Jesse Leassav, L-e-a-s-s-a-v, 217 Broadway, New York, New York, for the defendant.

THE COURT: All right, is there any legal reason why this defendant shouldn't be sentenced today?

MR. LEASSAV: Yes, there is, Your Honor. If Your Honor please, this case was tried before Judge Delagi and Judge Haddock. The presiding Justice was Judge Rossbach. I sent Judge Rossbach a letter, with copies to the two other judges, who was presiding at that time, asking him to set aside his verdict. I have not heard from either of the judges, the three of them. I indicated in the record that there was perjury between one of the principal witnesses--or one of the detectives and one of the principal witnesses committed during the trial, and other than that, I am ready for sentnece. I can imagine that these judges have taken this matter under advisement, although I haven't heard from them.

JUDGE BLOOM: Counsel, have you

made a formal motion?

MR. LEASSAV: I haven't, Your Honor. I though the same Bench would be present today.

JUDGE BOTTIGLIERI: Let's proceed with the sentence then. Is there anything you wish to say on behalf of this defendant before sentence is imposed?

MR. LEASSAV: If Your Honor please, this defendant is married. He has two children. He resides in Teaneck, New Jersey. He's a homeowner. He operated a two truck in the Bronx prior to this conviction. Of course, his license had been taken away. In view of what has taken place here up to the trial and before the trial, any sentence of this Court, in my opinion, would be anti-climactic. I am asking, under the circumstances, that the penalties that have already been imposed on this defendant-- that this Court exercise extreme leniency in its decision.

JUDGE BOTTIGLIERI: Why was the license taken away from him?

MR. LEASSAV: On a conviction, he

automatically has his license taken, Judge, tow truck license.

JUDGE BOTTIGLIERI: All right, the judgment of the Court is that the defendant be committed to the New York City Penitentiary, there to be dealt with according to law. Execution of sentence suspended.

JUDGE LEE: Now, that's to help him to get away from that thing. Let him now--we want him to get away from the drugs. He's got children.

MR. LEASSAV: Yes, sir. Thank you.

JUDGE LEE: That doesn't stop you from making a motion for a new trial, if you know.

MR. LEASSAV: Yes, I know.

JUDGE LEE: In formal papers.

- oOo -

February 12, 1965

The above is certified to be a true and correct transcript of the proceedings.

Doris Mayer, C.S.R.
Official Court Reporter

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JESSE ZASLAV
Counsellor at Law
217 Broadway
New York 7, New York
-
Barclay 7-1150-1

January 24, 1964

Honorable J. Howard Rossbach
Justice of Criminal Court of the City of New York
1400 Williamsbridge Road
Bronx, New York

Dear Judge Rossbach:

Re: Jesse Roberts
Date of Trial: January 17,1964

I, the undersigned, served as trial counsel to the above named defendant in a trial upon a charge of violation of Section 3305 of the Public Health Law (possession of narcotics). The defendant Roberts was convicted after trial upon the basis of testimony which I respectfully submit is perjurious.

The minutes of this trial now in my possession establish conclusively that serious contradictions appeared in the testimony of the key witnesses upon whose credibility the court of necessity had to rely as a basis for conviction.

A copy of the minutes is available to you from the official court stenographer who provided me with a copy of the same.

I respectfully direct your attention tolpage 22 of the minutes at which time your query to Detective Drummond asking whether he had known one of the complaining witnesses (Richard Warms), who had been a defendant in another case in which Jesse Roberts had been the complainant.

Detective Drummond testified at pages 21, 22:

Q. Now, you said that you know one of those boys. Which one were you referring to?

A. I did not know him personally. Detective Kilroy knew him - Richard Warms.

But on page 6 Detective Drummond had previously testified:

"Detective Kilroy and I, knowing one of the boys by name, went out to his various locations of his hangouts, such as the poolroom, bowling alley, luncheonettes and we left word that we wanted to see the two youths."

On page 34 the undersigned had questioned Detective Kilroy on cross-examination as follows:

JESSE ZASLAV
Counsellor at Law
217 Broadway
New York 7, New York
-
Barclay 7-1150-1

Q. Did you know either one of them (the prosecution witnesses?

A. I knew both of them.

Q. And under what circumstances did you know them?

A. Kids in the neighborhood. I know them for years.

At page 31 Warme (one of the prosecution witnesses) testified:

Q. Do you know any of the Detectives involved in this case?

A. I know them by sight.

Q. Just by sight?

A. Yes.

Q. Which one do you know by sight?

A. Detective Kilroy.

Q. Just by sight, is that it?

A. (Nods affirmatively).

At page 41 the following question was put to the witness Warme:

JUSTICE DELAGI: No, this is before the arrest of Roberts; you are being asked, did you ever speak to Kilroy before that?

WITNESS: Oh, no, sir.

Upon being questioned further by Judge Rossbach the witness testified:

Q. Are you sure?

A. Positive.

The witness further testified:

Q. Did you ever talk to Kilroy before?

A. The night before I was arrested?

JUDGE ROSSBACH: Yes.

THE WITNESS: No.

Q. And you did not know any of the other detectives involved here, right?

A. Just by sight.

This Court is urged to re-examine this testimony, particularly in the light of the following circumstances:

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JESSE ZASLAV
Counsellor at Law
217 Broadway
New York 7, New York

Barclay 7-1130-1

A: The prosecution witnesses had a motive to obtain the conviction of the defendant Roberts who, upon the night of his arrest, had complained to the police that the prosecution witnesses had stolen his automobile.

B: It is significant that Detectives Kilroy and Drummond attempted to induce the defendant Roberts to drop his charges against the prosecution witnesses, Warme and Runge, (see page 45) that they had stolen the automobile owned by Roberts.

C: The link between the detectives and witnesses Warme and Runge thus became a vital circumstance upon which this Court of necessity would base the finding of guilt; the obvious perjury committed to show there was no prior acquaintanceship or relationship between the detectives and Warme and Runge creates a manifest reasonable doubt.

This case presents a tragic sequel if the conviction is allowed to stand because the defendant Roberts, a married man with three young children, has now been deprived of earning his livelihood in his repair shop business situated at 2030 LaFontaine Avenue, Bronx, since he has lost his license to operate a tow-truck, an essential in the operation of his business.

This defendant never before was arrested or convicted of any crime. He has been a law abiding citizen of exemplary reputation in his place of business for more than eight years, and is deserving of every consideration by this Court.

Wherefore, I respectfully pray that this matter receive careful re-examination by this Court and by the District Attorney in the interests of justice and to avoid any possibility that a miscarriage of justice should be perpetrated.

Respectfully yours,

Jesse Zaslav

CC: Honorable Nicholas F. Delagi
Honorable Ambrose Haddock
Isidore Dollinger, Esq.

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CRIMINAL COURT

CITY OF NEW YORK

J. HOWARD ROSSBACH
JUDGE

February 1, 1964

Mr. Jesse Zaslav
Counsellor at Law
217 Broadway
New York 7, New York

Dear Mr. Zaslav:

In response to your letter of January 24 regarding People vs Jesse Roberts, I suggest that if you wish to make a motion to set aside the conviction you do so on proper motion papers, attaching thereto a copy of the minutes. In the normal course this would be referred to the trial bench for decision.

The foregoing is no indication that any such motion would be successful.

Very truly yours,

/s/ J. Howard Rossback

J. Howard Rossbach
Judge

JHR:ag

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

- -X

PEOPLE OF THE STATE OF NEW YORK :

vs. :

JESSE ROBERTS, :

Defendant. :

- -X

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavits of Jesse Zaslav, Esq., sworn to the 6th day of February, 1964 and upon the arraignment, all the pleadings and trial had herein, the undersigned will move this Court at Part IA, Criminal Court, City and State of New York at 162nd Street, Washington Avenue, on the 11th day of February, 1964 at 10:00 o'clock in the forenoon of that date or as soon thereafter as counsel can be heard for an order setting aside the decision in this matter and directing a new trial thereof.

New York, New York
February 6, 1964.

Yours, etc.

JESSE ZASLAV
Attorney for defendant
Office & P.O. Address
217 Broadway
New York 7, New York

TO: HON. ISIDORE DOLLINGER
District Attorney, Bronx County
161st Street and Grand Concourse
Bronx, New York

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

- -X

PEOPLE OF THE STATE OF NEW YORK

vs.

JESSE ROBERTS,

Defendant.

- -X

CITY AND STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

JESSE ZASLAV, being duly sworn, deposes and says:

That your deponent is the attorney for the defendant herein and is fully familiar with all the facts and circumstances of this action.

This case was brought to trial before the Hon. J. Howard Rossbach, Presiding Judge, and Judge Nicholas F. Delagi and Judge Ambrose Haddock on the 16th day of January, 1964 in this Court trial term Part 2A.

Your deponent is making this affidavit requesting that the decision of guilt be set aside on the grounds that the testimony in the trial on that day was perjurious in nature and it would serve the best interest of justice that such be done. Your deponent specifically refers to Page 22 of the minutes at which time Detective Drummond answered in reply to a query:

Q. Now, you said that you know one of those boys. Which

one were you referring to?

A. I did not know him personally. Detective Kilroy knew him - Richard Warme.

On page 6 Detective Drummond previously testified:

"Detective Kilroy and I, knowing one of the boys by name, went out to his various locations of his hangouts, such as the poolroom, bowling alley, luncheonettes and we left word that we wanted to see the two youths."

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Q. Do you know any of the Detectives involved in this case?

A. I know them by sight.

Q. Just by sight?

A. Yes.

Q. Which one do you know by sight?

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Q. Just by sight, is that it?

A. (Nods affirmatively).

At page 41 the following question was put to the witness Warne:

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WITNESS: Oh, No, sir.

Upon being questioned further by Judge Rossbach the witness testified:

Q. Are you sure?

A. Positive.

The witness further testified:

Q. Did you ever talk to Kilroy before?

A. The night before I was arrested?

JUDGE ROSSBACH: Yes.

THE WITNESS: No.

Q. As you did not know any of the other detectives involved here, right?

A. Just by sight.

This Court is urged to re-examine this testimony, particularly in the light of the following circumstances:

A: The prosecution witnesses had a motive to obtain the conviction of the defendant Roberts who, upon the night of his arrest, had complained to the police that the prosecution witnesses had stolen his automobile.

B: It is significant that Detectives Kilroy and Drummond attempted to induce the defendant Roberts to drop his charges against

the prosecution witnesses, Warne and Runge, (see page 45) that they had stolen the automobile owned by Roberts.

C: The link between the detectives and witnesses Warne and Runge thus became a vital circumstance upon which this Court of necessity would base the finding of guilt; the obvious perjury committed to show there was no prior acquaintance or relationship between the detectives and Warne and Runge creates a manifest reasonable doubt.

This case presents a tragic sequel if the conviction is allowed to stand because the defendant Roberts, is a married man with three young children, has now been deprived of earning his livelihood in his repair shop business situated at 2030 LaFontaine Avenue, Bronx, since he has lost his license to operate a tow-truck, an essential in the operation of his business.

This defendant never before was arrested or convicted of any crime. He has been a law abiding citizen of excellent reputation in his place of business for more than eight years, and is deserving of every consideration by this Court.

The law is well adjudicated in this State to the effect that where perjury is committed in any trial, the Court which heard the testimony is under a duty to investigate as to whether or not perjury has in fact been committed and in light of their findings, to reverse their opinion, for such findings to be inthe affirmative. It is quite clear to your deponent that under the circumstances outlined herein

the prosecution witnesses, Warme and Runge, (see page 45) that they had stolen the automobile owned by Roberts.

C: The link between the detectives and witnesses Warme and Runge thus becams a vital circumstance upon which this Court of necessity would base the finding of guilt; the obvious perjury committed to show there was no prior acquaintance or relationship between the detectives and Warme and Runge creates a manifest reasonable doubt.

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The law is well adjudicated in this State to the effect that where perjury is committed in any trial, the Court which heard the testimony is under a duty to investigate as to whether or not perjury has in fact been committed and in light of their findings, to reverse their opinion, for such findings to be inthe affirmative. It is quite clear to your deponent that under the circumstances outlined herein

would smather this case as one in which a thorough investigation is necessary.

This defendant should not be deprived of his constitutional rights to be fair and impartial trial and to be faced with evidence which would constitute sufficient factual pattern to find him guilty beyond any iota of reasonable doubt if such evidence points in that direction.

WHEREFORE, your deponent respectfully prays that the decision as heretofore pronounced in this case be set aside and that a new trial of the issues be directed by this Court.

JESSE ZASLAV

Sworn to before me this
6th day of February, 1964.

/s/ Carl S. Klein
Notary Public, State of New York
No. 30 7201075
Qualified in Nassau County
Commission Expires March 30, 1964

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

PEOPLE OF THE STATE OF NEW YORK :

vs. :

JESSE ROBERTS, : Docket No.

Defendant. : A 5536/1963

CITY AND STATE OF NEW YORK)
COUNTY OF BRONX) ss:

GEORGE D. CASEY, being duly sworn, deposes and says:

That I am an Assistant District Attorney in the office of the District Attorney of Bronx County.

That I have read the affidavit of Jesse Zaslav, attorney for the defendant herein.

That this case was brought to trial before the Honorable Howard Rossbach, Presiding Judge, Honorable Nicholas F. Delagi, and Honorable Ambrose Haddock, on the 16th day of January, 1964, in this Court, Trial Term Part 2B.

That after a fair and impartial trial on the merits a verdict of guilty was entered by said Court. That all the facts were taken into consideration by the Court at the time of trial and careful consideration given thereto. There is no contention made by the defendant that there is newly discovered evidence which was not before the court at the time of trial; therefore, the affidavit submitted by the attorney

for defendant is without merit.

WHEREFORE, your deponent respectfully requests that the defendant's motion be denied.

/s/ George P. Casey

Sworn to before me this
11th day of March, 1964.

/s/ John P. McCarthy
Notary Public, State of New York
No. 03-2602460
Qualified in Bronx County
Commission Expires March 31, 1965

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

SHELDON ENGELHARD, being duly sworn deposes and says:

I am associated in the practice of law with Carl Rachlin, the attorney for the appeal herein.

No opinion or memo was rendered by the Court below.

Sworn to before me this
20th day of April, 1965.

CAROL RUBIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 2[illegible]
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1962

Sheldon Engelhard
SHELDON ENGELHARD

BLANK PAGE

ATTORNEY'S CERTIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

I, SHELDON ENGELHARD, an attorney associated with Carl Rachlin, attorney for the defendant-appellant in this appeal hereby certifies, pursuant to Rule 2105 CRLR that I have compared the foregoing papers with the original on file in the office of the Clerk of the Criminal Court of the City of New York and found them to be true and complete copies of said original and the whole thereof of the Notice of Appeal, the judgment of conviction appealed and all the papers which were used in the Court below now on file in the office of the Clerk of the Criminal Court in the State of New York;

Dated: April 20th, 1965.

s/ Sheldon Engelhard
SHELDON ENGELHARD

ORDER SETTLING CASE

The foregoing case on appeal, containing all the evidence is hereby settled and ordered on file.

Dated:

_____

Judge, Criminal Court of the City of New York

CLERK'S RETURN ON APPEAL

I, the undersigned, Clerk of the above named Court, respectfully make return to the Appellate Term of the Supreme Court for the First Judicial Department and certify upon the affidavit of the appellant's attorney that there are hereto attached correct copies of the Notice of Appeal and of all papers required to be returned pursuant to the Code of Criminal Procedure and the Rules and Regualtions of the Appellate Term of the Supreme Court for the First Judicial Department.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of the above named Court this day of , 1968.

_____

CLERK

STIPULATION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK :

On the Complaint of :

DET. FREDERICK DRUMMOND, :

Plaintiff-Respondents :

-against- :

JESSE ROBERTS, :

Defendant-Appellant :

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto, that the stipulations for adjournment need not be reproduced in the Record on Appeal.

Dated: New York, New York

April 20, 1965.

DISTRICT ATTORNEY, BRONX COUNTY

/s/ Carl Rachlin

ATTORNEY FOR DEFENDANT-APPELLANT

Jesse Zaslav
COUNSELLOR AT LAW
217 BROADWAY
NEW YORK 7, NEW YORK
—
BARCLAY 7-1150-1

January 24, 1964

Honorable J. Howard Rosebach
Justice of Criminal Court of the City of New York
1430 Williamsbridge Road
Bronx, New York

Dear Judge Rosebach:

Re: Jesse Roberts
Date of Trial: January 16,1964

I,the undersigned, served as trial counsel to the above named defendant in a trial upon a charge of violation of Section 3305 of the Public Health Law (possession of narcotics). The defendant Roberts was convicted after trial upon the basis of testimony which I respectfully submit is perjurious.

The minutes of this trial now in my possession establish conclusively that serious contradictions appeared in the testimony of the key witnesses upon whose credibility the court of necessity had to rely as a basis for conviction.

A copy of the minutes is available to you from the official court stenographer who provided me with a copy of the same.

I respectfully direct your attention to page 22 of the minutes at which time your query to Detective Drummond asking whether he had known one of the complaining witnesses (Richard Vance), who had been a defendant in another case in which Jesse Roberts had been the complainant. Detective Drummond testified at pages 21, 22:

Q. Now, you said that you knew one of those boys. Which one were you referring to?

A. I did not know him personally. Detective Kilroy knew him - Richard Vance.

But on page 8 Detective Drummond had previously testified:

"Detective Kilroy and I, knowing one of the boys by name, went out to his various locations of his hangouts, such as the poolroom, bowling alley, luncheonettes and we left word that we wanted to see the two youths."

On page 24 the undersigned had questioned Detective Kilroy on cross-examination as follows:

Jesse Zaslav
COUNSELLOR AT LAW
217 BROADWAY
NEW YORK 7, NEW YORK
BARCLAY 7-1150-1

Q. Did you know either one of them (the prosecution witnesses?
A. I know both of them.
Q. And under what circumstances did you know them?
A. Kids in the neighborhood. I know them for years.

At page 31 Warne (one of the prosecution witnesses) testified:

Q. Do you know any/of the Detectives involved in this case?
A. I know them by sight.
Q. Just by sight?
A. Yes.
Q. Which one do you know by sight?
A. Detective Kilroy.
Q. Just by sight, is that it?
A. (Nods affirmatively).

At page 41 the following question was put to the witness Warne:

JUSTICE DELAGI: No, this is before the arrest of Roberts; you are being asked, did you ever speak to Kilroy before that?
WITNESS: Oh, no, sir.

Upon being questioned further by Judge Rosenbach the witness testified:

Q. Are you sure?
A. Positive.

The witness further testified:

Q. Did you ever talk to Kilroy before?
A. The night before I was arrested?

JUDGE ROSENBACH: Yes.
THE WITNESS: No.

Q. And you did not know any of the other detectives involved here, right?
A. Just by sight

This Court is urged to re-examine this testimony, particularly in the light of the following circumstances:

Jesse Zaslav
COUNSELLOR AT LAW
217 BROADWAY
NEW YORK 7, NEW YORK
BARCLAY 7-1150-1

A: The prosecution witnesses had a motive to obtain the conviction of the defendant Roberts who, upon the night of his arrest, had complained to the police that the prosecution witnesses had stolen his automobile.

B: It is significant that Detectives Kilroy and Drummond attempted to induce the defendant Roberts to drop his charges against the prosecution witnesses, Warne and Rungo, (see page 45) that they had stolen the automobile owned by Roberts.

C: The link between the detectives and witnesses Warne and Rungo thus became a vital circumstance upon which this Court of necessity would base the finding of guilt; the obvious perjury committed to show there was no prior acquaintanceship or relationship between the detectives and Warne and Rungo creates a manifest reasonable doubt.

This case presents a tragic sequel if the conviction is allowed to stand because the defendant Roberts, a married man with three young children, has now been deprived of earning his livelihood in his repair shop business situated at 2020 LaFontaine Avenue, Bronx, since he has lost his license to operate a tow-truck, an essential in the operation of his business.

This defendant never before was arrested or convicted of any crime. He has been a law abiding citizen of excellent reputation in his place of business for more than eight years, and is deserving of every consideration by this Court.

Wherefore, I respectfully pray that this matter receive careful re-examination by this Court and by the District Attorney in the interests of justice and to avoid any possibility that a miscarriage of justice should be perpetrated.

Respectfully yours,

Jesse Zaslav

CC: Honorable Nicholas F. Delagi
Honorable Ambrose Haddock
Isidore Dollinger, Esq.

OFFICE OF THE DISTRICT ATTORNEY

COUNTY OF BRONX 51, NEW YORK

January 27, 1964.

Jesse Zaslov, Esq.
217 Broadway,
New York 7, New York.

Re: People vs Roberts.

Dear Sir:

A copy of your letter addressed to Judge Rossbach has been received at this office.

We cannot make any sort of determination from the matters you have culled out of context. In order for this office to come to a conclusion with reference to your claim of perjury it would be necessary for us to examine the record of the trial. Since you have the minutes, it would be appreciated if you would provide us with a copy of the same.

We would further appreciate any additional information that you have as to why the three member bench found your client guilty when the items to which you point as constituting perjury appear in the record itself.

Very truly yours,

Irvin J. Goldsmith

Irvin J. Goldsmith
Assistant District
Attorney

DRAFT

(184)

STATEMENT UNDER RULE 5531

This is an appeal from a judgment of conviction dated January 17, 1964 by Hon. J. Howard Rossbach, presiding justice, Hon. Ambross J. Haddock, Associate justice, and Hon. Nicholas F. Delagi, associate justice at Part 2B, Criminal Court of the City of New York, County of the Bronx, finding the defendant-appellant guilty of vidating Public Health Law Section 3305.

No opinion was rendered. No application for a Certificate of Reasonable Doubt was made. The defendant-appellant was sentenced by Hon. Neil P. Bottiglieri, Hon. John B. Lee and Hon. Max Bloom at Part 2B, Criminal Court of the City of New York, Borough of the Bronx on January 31, 1964, to an indefinite term in the penitentiary; that sentence was suspended.

There has been no change of parties or attorneys herein except that the attorney for the defendant-appellant on appeal is Carl Rachlin; Jesse Zaslav was the attorney for the defendant at all times prior to the said appeal.

The notice of appeal was served on the 28th day of February, 1964. The appendix method is not being used.

(184)

ATTORNEY'S

STATE OF NEW YORK
COUNTY OF NEW YORK

CERTIFICATION

I, SHELDON ENGELHARD, an attorney associated with Carl Rachlin, attorney for the defendant-appellant in this appeal hereby certifies, pursuant to Rule 2105 CPLR that I have compared the foregoing papers with the original on file in the office of the Clerk of the Criminal Court of the City of New York and found them to be true and complete copies of said original and the whole thereof of the Notice of Appeal, the judgment of conviction appealed and all the pppers which were used in the Court below now on file in the office of the Clerk of the Criminal Court in the State of New York;

Dated; March ,1965.

SHELDON ENGELHARD

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF BRONX 51, NEW YORK

January 27, 1964.

Jesse Zanlov, Esq.
217 Broadway
New York 7, New York.

Re: People vs Roberts.

Dear Sir:

A copy of your letter addressed to Judge Rosebach has been received at this office.

We cannot make any sort of determination from the matters you have called out of context. In order for this office to come to a conclusion with reference to your claim of perjury it would be necessary for us to examine the record of the trial. Since you have the minutes, it would be appreciated if you would provide us with a copy of the same.

We would further appreciate any additional information that you have as to why the three member bench found your client guilty when the items to which you point as constituting perjury appear in the record itself.

Very truly yours,

/s/ Irvin J. Goldsmith

Irvin J. Goldsmith
Assistant District Attorney

CRIMINAL COURT
CITY OF NEW YORK

J. HOWARD ROSENBACH
JUDGE

February 1, 1964

Mr. Jesse Zeslav
Counsellor at Law
217 Broadway
New York 7, New York

Dear Mr. Zeslav:

In response to your letter of January 24 regarding People vs Jesse Roberts, I suggest that if you wish to make a motion to set aside the conviction you do so on proper motion papers, attaching thereto a copy of the minutes. In the normal course this would be referred to the trial bench for decision.

The foregoing is no indication that any such motion would be successful.

Very truly yours,

/s/ J. Howard Rosenbach

J. Howard Rosenbach
Judge

JHR:mg

J. HOWARD ROSSBACH
JUDGE

CRIMINAL COURT

CITY OF NEW YORK

February 1, 1964

Mr. Jesse Zaslav
Counsellor at Law
217 Broadway
New York 7, New York

Dear Mr. Zaslav:

In response to your letter of January 24 regarding People vs Jesse Roberts, I suggest that if you wish to make a motion to set aside the conviction you do so on proper motion papers, attaching thereto a copy of the minutes. In the normal course this would be referred to the trial bench for decision.

The foregoing is no indication that any such motion would be successful.

Very truly yours,

J. Howard Rossbach

J. Howard Rossbach
Judge

JHR:ag

5. The defendant was charged with violating Public Health Law Section 3305, specifically, he was alleged to be in possession of marijuana.

6. This appeal is from a judgment convicting the defendant of violating Public Health Law Section 3305 on January 31, 1964.

7. The appendix method is not being used.

Jesse Zaslav
COUNSELLOR AT LAW
217 BROADWAY
NEW YORK 7, NEW YORK
BARCLAY 7-1150-1

February 27, 1964

I hereby acknowledge receipt of the package for C.O.R.E.

Stanton Vitello

Jan 31 #1 sentencing Battiglieri Lee

Penitentiary indefinite ss.

1-A

100 Center
3rd Floor Legal

February 1, 1965

Mr. Louis F. Lanuto
1160 Rhinelander Avenue
Bronx, New York

RE: People vs. Jesse Roberts

Dear Mr. Lanuto:

We believe that you were the reporter at the arraignment of our client, Jesse Roberts, on November 8, 1963. If after checking your records you were the stenographer at that arraignment we shall appreciate your transcribing the minutes of same and sending us an original and six copies [redacted].

Inasmuch as our appeal was originally dismissed for lack of prosecution but has been restored by the Appellate Term pursuant to our motion time is of the essence.

Your cooperation of our request will certainly be appreciated.

Very truly yours,

SE:hf
SPECIAL DELIVERY

BY: SHELDON ENGELHARD

February 1, 1965

Miss Doris Mayer
60 South Devoe Avenue
Yonkers, New York

RE: People vs. Jesse Roberts

Dear Miss Mayer:

We have been informed that you were the court stenographer on January 31, 1964 for the sentencing of our client Jesse Roberts.

We have been given a limited amount of time, pursuant to our motion, by the Appellate Term to perfect our appeal. Therefore, we shall appreciate an original and six copies of the minutes of [redacted] sentencing to be sent to us without delay.

Your consideration of this request will bertainly be appreciated.

Very truly yours,

VLADECK, ELIAS, FRANKLE & VLADECK

BY: SHELDON ENGELHARD

SE:hd
SPECIAL DELIVERY

D O R I S M A Y E R
Certified Shorthand Reporter
60 SOUTH DEVOE AVE.
YONKERS 5, N.Y.

February 12, 1965

Vladek, Elias, Frankle & Vladeck, Esqs.
165 West 46th Street
New York, N.Y., 10036

RECEIVED
FEB 16 1965
VLADECK, ELIAS, FRANKLE & VLADECK

Att. of: Sheldon Engelhard, Esq.

Dear Sir:

Enclosed please find transcript of minutes taken at sentencing of Jesse Roberts on January 31, 1964.

You will require five certified copies of the original complaint, and the administrative offices will require five copies of the fingerprint record of the defendant. I shall complete these papers, and forward same to you on or about Monday, February 15, 1965, which is the earliest date that I shall have an opportunity to obtain the aforementioned official papers, which are always kept in the files of the court.

Very truly yours,

Doris Mayer

Official Court Reporter

February 24, 1965

Mr. Herbert E. Moorehead
1061 Boston Road, Apartment 21
Bronx 56, New York

RE: People vs. Jesse Roberts

Dear Mr. Moorehead:

We have been informed that you were the Court Reporter on December 5, 1963 where a motion to suppress evidence was argued in behalf of Jesse Roberts.

We are now attempting to perfect the appeal in this matter for the April term of the Appellate Term. Accordingly, please supply us with an original and four copies of the minutes taken during the aforementioned motion.

Prompt consideration of this request will certainly be appreciated.

Very truly yours,

VLADECK, ELIAS, FRANKLE & VLADECK

BY: SHELDON ENGELHARD

SE:hf
SPECIAL DELIVERY

March 4, 1965

Mr. Herbert E. Moorehead
1061 Boston Road, Apt. 21
Bronx 56, New York

RE: People vs. Jesse Roberts

Dear Mr. Moorehead:

We are again writing to you with reference to minutes that were taken by you on the Motion to Suppress Evidence argued in behalf of Jesse Roberts.

We will not be permitted an additional extension of time to perfect our appeal and all papers including the minutes taken at the aforesaid motion must be filed by the middle of next week.

Please send us the minutes without delay.

Very truly yours,

VLADECK, ELIAS, FRANKLE & VLADECK

BY: SHELDON ENGELHARD

SE:hf

March 19, 1965

Mr. Herbert E. Moorehead
1061 Boston Road
Bronx, New York

Dear Mr. Moorehead:

We are enclosing an Affidavit which speaks for itself. Please execute the same and return to our office immediately.

Your cooperation in this matter will certainly be appreciated.

Very truly yours,

VLADECK, ELIAS, FRANKLE & VLADECK

BY: SHELDON ENGELHARD

SE:dk
Encl.

March 26, 1965

Office of the District Attorney
Bronx County
851 Grand Concourse
Bronx, New York

Attention: Walter Dillon, Esq.

RE: People against Roberts

Dear Mr. Dillon:

We are enclosing our stipulation submitted to the Appellate Term to extend the time in which we may perfect our appeal together with an affidavit as to the reasons for same.

Very truly yours,

VLADECK, ELIAS, FRANKLE & VLADECK

BY: SHELDON ENGELHARD

SE:hf
enc.

March 31, 1965

Mr. Morris Eisner
2911 Barnes Avenue
Bronx 67, New York

RE: People vs. Jesse Roberts

Dear Mr. Eisner:

We have been informed that you may have been the court reporter on the Motion to Suppress Evidence before Judge Ohringer either on December 5, 1963 or January 8, 1964. Please communicate with us immediately if you were the court reporter on that motion since the minutes of said motion must be reprinted on Mr. Robert's appeal.

Since the court has given us two prior extensions in which to perfect the appeal, and no further extensions will be granted under any circumstances, we must have those minutes or know that you were not the reporter so we may determine who was the official court stenographer and secure the minutes.

Your prompt consideration in this request will certainly be appreciated.

Very truly yours,

VLADECK, ELIAS, FRANKLE & VLADECK

BY: SHELDON ENGELHARD

SE:hf

October 4, 1965

Mr. Jesse Roberts
850 E. 161st Street
Bronx, New York

Dear Mr. Roberts: RE: People v. Roberts

I regret to inform you that the Appellate Term of the Supreme Court unanimously affirmed the judgment of conviction. Inasmuch as there was no opinion attached to the decision, it is impossible to determine on which basis the decision was made.

If you have any questions concerning this matter, please do not hesitate to call and let me know.

Very truly yours,

CR/bs

CARL RACHLIN

People v. Porter, 37 Misc. 2d 73, 236 NYS 2d 162,
(Sup. Ct., Queens County - 1962)
Irwin Shapiro,

Where alleged contraband which was found in apartment of husband and wife at time of their arrest was flushed down toilet by husband at police station, a subsequent search of another apartment & which police found key in wife's purse was without consent although wife accompanied police officers, and such search and seizure was illegal. ¶

cited Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436

"The People have not here sustained the burden, which is ultimately theirs, of establishing that there was a consent given & the search made (Bumper v. United States, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654; Channel v. United States (9 Cir.), 285 F. 2d 217; Judd v. United States, 89 U.S. App. D.C. 64, 190 F. 2d 649).

V

People v. Langella, 224 N.Y.S.2d 802
Sup. Ct. Crim. Term. Kings County, Part 1A
J. Irwin Shapiro

Δ, on parole was arrested by parole officer. A search of car driven by Δ revealed a hand gun. Δ ~~pastured~~ retrieved car key from his house on instruction from parole officer.

"In this case the consent to the search of the trunk of the automobile, if any, depends on an implication to be drawn from the delivery of the car key, but the attending circumstances negative that inference and I find it to be the fact that there was merely submission to authority, which is not consent (Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436; Catalanotte v. United States, 6 Cir., 208 F.2d 264; Judd v. United States, 89 U.S. App. D.C. 64, 190 F.2d 649). Under such circumstances, if this were the ordinary search and seizure case dealing with an ordinary individual — not a parolee — I would hold the search to be illegal since a presumption exists against a waiver of constitutional rights

21

(7)

People v. Langella

(Johnson v. Zerbst 304 U.S. 458. 58 S. Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357) and the burden of showing consent is on the People (Bumper v. United States, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654, Channel v. United States, 9 Cir. 285 F. 2d 217).

Conclusion

- although admissible, (not conceded), illegally acquired evidence may not be used in an arrest for a misdemeanor.

- ~~if arrest after topic finished is illegal unlawful search~~

- if evidence is unlawfully acquired after arrest w/o warrant leads to dismissal then arrest subsequent to illegally acquired evidence should not be permitted. See Legler v. Chazanoff, 32 Misc. 2d 813 & 238 NYS2d 991.

- Legler v Bruya, 246 NYS2d 925 Suppl Ct. - 42 Misc 2d 154.

"Even assuming that the officers had probable cause to arrest the Δ for a misdemeanor committed in their presence, the fact is that no arrest was made prior to the search, and consequently the search was illegal, since it does not fall into any of the three approved categories.

(a)

11 NY2d 397 - Desmond, C.J.

People v. Yarmosh, 230 NYS2d 185 (1962)

- police officers w/o search warrant entered into Δ's home through an open door; betting slips in Δ's handwriting were found

"This forcible breaking into a dwelling house was a violation of Fourth Amendment rights since there was neither search warrant nor consent, and the intrusion and search were not even incident to a lawful arrest since the crimes for which Δs were arrested and tried were misdemeanors only (Mapp v. Ohio, 367 U.S. 643, 81 S.Ct 1684, 6 L Ed 2d 1081, supra; Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 145; People v. Defore, 242 N.Y. 13, 18, 150 N.E. 585, 586; People v. Loria, 10 NY 2d 368, 373, 223 N.Y.S. 2d 462, 179 N.E. 2d 478, supra; People v. Moore, 11 N.Y.S. 2d 271, 228 N.Y.S. 2d 822, 183 N.E. 2d 225; Civil Rights Law, Consol. Laws, c. 6, §8). It was error, therefore, to admit the evidence (Mapp v. Ohio, supra)."

"The Mapp holding is applicable if the point was preserved for review by objection or by some inquiry by defense counsel into the lawfulness of the methods of getting

a) People v. Yarmosh

the evidence or 'at least some effort in that direction' (People v. Friola, 11 N.Y. 2d 157, 159, 182 N.E. 2d 100, 101, 227 N.Y.S. 2d 423, 424, supra).

- See People v. O'Neill - 227 NYS. 2d 416
- See People v. Coffey - 227 NYS 2d 412.

People v. Beaman, 253 NYS2d 674
(Criminal Court of City of New York, New York County, Part 2B-1 - 1964)
Rinzel

"A search of a person w/o a warrant is not unreasonable if it is made as an incident to a lawful arrest and contemporaneous therewith as to time and place (Preston v. United States, supra; Carroll v. United States, supra; People v. Defore, 242 N.Y. 13, 150 N.E. 585). However, such search must be truly incidental to the primary purpose of arrest (United States v. Robinson, 2 Cir., 325 Fed 391; People v. Roach, 44 Misc. 2d 40, 253 NYS2d 24). The reason for this rule, is to prevent the destruction of evidence and to seize weapons or other items which may be employed in assaulting the arresting officer or aid in the escape of the accused (Preston v. United States, supra; People v. Coiro, Sobel, J., Kings Co. Sup. Ct., N.Y.L.J. Oct 2, 1964, p. 18, col. 1).

People v. Roberts

App Term
1st Dept

5/4/65

Before: Capozzoli, Hofstadter, Hecht

I. Charge:
A. Viol. of P.H.L. 3305
1. unlawful possession of narcotics
2. misdemeanor.

B. Δ found guilty on Jan. 17th 1964; sentenced to N.Y.C. Penitentiary; execution suspended.

II. Facts:
A. - Nov. 7, '63 - Δ reported stolen autos in late afternoon; suspected 2 youths
- 11 P.M. police reported autos found & took Δ & pct to identify the 2 youths.
- one of youths made charges:
1. √ marijuana
2. police receiving radio
3. gun and ammo.

discrepancy - Δ claims the police, with warrant, left station house to find illegal allegedly thrown away
- Δ waited & then left; met Torres & proceeded to shop; police tried to convince Δ to drop charges & Δ refused.

* 9/ ▷ Kaeer
Cambodian was
present in shop
record he was invited
the search. Object that he
an intelligent waiver
of rights
against self incrimination

police say Δ invited them &
six garages + after they
found the marijuana Δ
said "It's mine, you
got me".

II. Law:

A- Search + Seizure

1. misdemeanor requires search warrant.

Since arrest was made following an unlawful search, that arrest, for a misd. not committed in ofcrs presence also becomes unlawful.

2. * Submission to authority p.5

3. No arrest made prior to search + seizure - People v Bruja, p.14, - 42 Misc. 2nd 154 (64)

B. Right to Counsel

1. fundamental right.
2. Express
3. must be knowingly + intelligently waive rights - Henry v. Miss. 85 S. Ct. 564 ('65)

Johnson v. Zerbst,

C. Ct has right to review facts in det. of sentence

Box 41
Folder 4

STATE OF NEW YORK J. SCHWERNER, MICHAEL, 1963

Please Retain Original Order

Secretary of Wisconsin

CRIMINAL COURT CITY OF NEW YORK
COUNTY OF NEW YORK

----------x

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NOTICE OF APPEAL

MICHAEL H. SCHWERNER & LISA HENRI

Defendants-Appellants.

----------x

SIRS:

PLEASE TAKE NOTICE, that the defendants herein hereby appeal from the judgment of conviction rendered against them in this Court for violation of Section 722 (2) of the Penal Law on the 24th day of July, 1963, and from each and every intermediate order therein made and more particularly from the sentence herein imposed on the same day by Hon. Judge T. Vincent Quinn said sentence being as follows:

MICHAEL H. SCHWERNER - SIXTY DAYS

LISA HENRI - SIXTY DAYS

Dated: New York, New York

Yours, etc.

[redacted]S.
Attorneys for Defs.
Office & P.O. Address
40 East 49 Street
New York 17, N.Y.

TO: HON. FRANK S. HOGAN, District Attorney
New York County
155 Leonard Street
New York 13, New York

CLERK, CRIMINAL COURT NEW YORK COUNTY
100 Centre Street
New York 13, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

PEOPLE OF THE STATE OF NEW YORK,

MICHAEL H. SCHEFFNER & LISA HENRI

-against-

STIPULATION
OF CONSENT

----------x

IT IS HEREBY STIPULATED AND AGREED, by and between GEORGE SCHIFFER, ESQ., attorney for the defendants herein and Assistant District Attorney, that the said Assistant District Attorney consents to the granting of a Certificate of Reasonable Doubt in the instant action, in that the defendant will have served his sentence and that valid questions of law and fact, which merit attention of the Appellate Court do exist.

IT IS FURTHER STIPULATED AND AGREED, and consented to that bail, pending the appeal, is not required and that the defendants be released on parole, all of which is subject to the Court's approval.

Assistant District Att.

GEORGE SCHIFFER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

PEOPLE OF THE STATE OF NEW YORK,

-against-

NOTICE OF MOTION

[redacted]

Defendants-Appellants.

----------x

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of George Schiffer, sworn to the 24th day of July, 1963, and the stipulation of consent of the Ass't District Attorney, to the granting of a Certificate of Reasonable Doubt, add all of the pleadings and proceedings heretofore had in the Criminal Court of the City of New York, the undersigned will move in the Supreme Court of the State of New York, County of New York, Part XXX thereof at the Courthouse at 100 Centre Street on the 25th day of July, 1963, at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard for an order granting the above named defendants-appellants, a Certificate of Reasonable Doubt, pursuant to the provisions of Section 527 and 529 of the Code of Criminal Procedure admitting the defendants to bail pending the determination of their appeal from the judgment of conviction herein to the Appellate Division of the Supreme Court, First Department and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
July 25, 1963

Yours, etc.

SCHIFFER & COHEN
Attorneys for Defendants
Office & P.O. Address
40 East 49 Street
New York 17, New York

TO: HON. FRANK S. HOGAN, District Attorney
New York County
155 Leonard Street
New York 13, N.Y.

CLERK, SUPREME COURT
NEW YORK COUNTY
100 Centre Street

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

AFFIDAVIT

MICHAEL H. SCHWERNER & LISA HENRI

Defendants-Appellants.

----------x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

GEORGE SCHIFFER, being duly sworn deposes and says:

That he represents the above named defendants in the prosecution of their appeal to the Appellate Division of this Court.

That the defendants were arrested and charged with a violation of the offense of Section 722 (2) of the Penal Law by the Hon. Judge T. Vincent Quinn in the Criminal Court of the City of New York and consequently on the same day sentenced by the Hon. Judge T. Vincent Quinn of said Criminal Court City of New York, as follows:

MICHAEL H. SCHWERNER - SIXTY DAYS

LISA HENRI - SIXTY DAYS

That Notice of Appeal was duly filed and served on the District Attorney of New York County and the Clerk of the Criminal Court of New York County on July 25, 1963, and notice requirements were waived by the District Attorney's Office.

That the stenographic minutes of the trial have been ordered by the defendants herein and will be available to this learned Court.

That the Court below was in error in convicting the defendants herein as follows:

1. Each defendant is a responsible citizen, acting, as the record shows, in good faith and in the belief that the activity was necessary for the benefit of the public. No defendant acted for personal gain or with criminal intent, but through moral conviction.

The defendants are not criminals. They are usefully employed. They committed no act of violence. Consequently, no purpose is served by incarcerating them. In the circumstances, the sentence imposed was grossly excessive.

2. The uncontroverted evidence was that the Rutgers Housing Project is a public project being constructed with public funds, and that, in the construction, discrimination was practiced by both unions and employers to prevent or limit the hiring of Negroes for work on the project. Such conduct by unions and employers was contrary to law and constituted the commission of §43 of the Civil Rights Law and other Statutes of the State of New York and the United States. The defendants, acting as good citizens, sought to prevent the commission of such crimes by peacefully, sitting upon the ground. Defendants' conduct was therefore entirely lawful and could not constitute disorderly conduct within the meaning of Section 722 (2) of the Penal Law.

3. Section 722 (2) of the Penal Law, under which the defendants were convicted, applies by its terms to one who acts "with intent to provoke a breach of the peace" or "whereby a breach of the peace may be occasioned." The record is clear that defendants acted for the very purpose of preventing a breach of the peace and had no criminal intent.

4. If the statute were interpreted to apply to defendants, it would be contrary to the Constitution of the State of New York and the Constitution of the United States.

5. Defendants, in seeking to eliminate racial discrimination in hiring were engaged in an activity within the scope of the United States laws concerning labor-management relations. Since the United States, has pre-empted the field of labor management relations insofar as interstate commerce is affected and since the Construction Industry directly affects interstate commerce, defendants were entirely privileged to engage in their admittedly peaceful activities.

That no previous application for the relief sought herein has been made to this or any other Court.

GEORGE SCHIFFER

Sworn to before me this

24th day of July, 1963.

[illegible]
NOTARY PUBLIC
COMMISSIONER OF DEEDS
[illegible] New York 1-462
Certificate Filed in New York County
Commission Expires Aug. [illegible]

At a Special & Trial Term, Part XXX of the Supreme Court, held in and for the County of New York at the Courthouse, 100 Centre St., New York, on the 25th day of July, 1963.

P R E S E N T

H O N.

JUSTICE

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

Defendants-Appellants.

The above named defendants having been convicted in the Criminal Court of New York City, County of New York, Part 2A Thereof and sentenced therein, and having appealed from said judgment of conviction to the Appellate Division of the Supreme Court, 1st Department and having moved before this Court for a Certificate that in its opinion there is reasonable doubt whether such judgment of conviction should stand, and for an order admitting the defendants to bail pending the determination of the said appeal; and the said motion having duly come on to be heard on the 25th day of July, 1963, and after hearing SCHIFFER & COHEN, attorneys for the defendants, in support of said motion and FRANK S. HOGAN, District Attorney of New York County, by Assistant District Attorney not opposing and consenting to this certificate and due deliberation having been had thereon

NOW, upon reading and filing the Notice of Motion dated July 25, 1963, and the affidavit of GEORGE SCHIFFER, sworn to the 24th day of July, 1963, together with proof

of due service, thereof and upon the record of the trial held in the aforesaid Criminal Court and for the reasons set forth herein, it is

CERTIFIED, that it is the opinion of this Court that there is reasonable doubt whether the judgment of conviction for the offense of Section 722 (2) of the Penal Law rendered against the defendants in Criminal Court of New York City, County of New York on the 24th day of July, 1963, and the sentence thereon on the same day should stand by reason of the fact that there are valid questions of law and fact which merit the attention of the said Appellate Division, and it is further

ORDERED, that the defendants be admitted to parole during the pending of such appeal.

E N T E R

_____

Justice Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

PEOPLE OF THE STATE OF NEW YORK

-against- 41926/63

SAMUEL FRIEDMAN, ET AL, STIPULATION

Defendants-Appellants.

----------X

It is hereby stipulated and agreed by and between the District Attorney and the attorney for the defendants herein that the time of defendants to serve their brief is extended to and including March 15, 1964, and that these appeals be adjourned to the April calendar.

District Attorney

George Schiffer

SEDITE STATE OF NEW YORK vs. SPROWAL, WM. and STEVEN GORDON, 1966-1967 Box 40 Folder 5

Please Retain Original Order

Historical Society of Wisconsin

DUPLICATE ORIGINAL

At a Special & Trial Term Part 30 of the Supreme Court, held in and for the County of New York at the Courthouse,

on the 10th day of November, 1964.

P R E S E N T

HON.

JUSTICE

- x

PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

vs. : O R D E R

WILLIAM SPROWAL :

Defendant-Appellant. :

- x

The above named defendant having been convicted in the Criminal Court of New York City, County of New York, Part III thereof and sentenced therein, and having appealed from said judgment of conviction (of D.C.) to the Appellate Term of the Supreme Court, and having moved before this Court for a Certificate that in its opinion there is reasonable doubt whether such judgment of conviction should stand, and for an order continuing the defendant on parole pending the determination of the said appeal; and the said motion having duly come on to be heard on the 10th day of November, 1964, and after hearing Lloyd McAulay, attorney for defendant, in support of said motion and due deliberation having been had thereon

NOW, upon reading and filing the Notice of Motion dated the 10th day of November, 1964, and the affidavit of Lloyd McAulay sworn to the 10th day of November, 1964, together

with proof of due service, thereof and upon the record of the trial held in the aforesaid Criminal Court and for the reasons set herein, the motion is granted and it is

CERTIFIED, that it is the opinion of this Court that there is reasonable doubt whether the judgments of conviction rendered against the defendant in Criminal Court of New York City, County of New York, on the 10th day of November, 1964. should stand by reason of the fact that there are questions of law and fact which merit the attention of the said Appellate Term, and it is further ORDERED that the defendant be released from custody upon furnishing bail; sum $500 during the pendency of such appeal.

ENTER

Joseph A. Sarafite
Justice Supreme Court

JOSEPH A. SARAFITE

THE FOLLOWING PAGE(S) ARE THE BEST COPY AVAILABLE.

94 Form No. 22

No. 243

JUNE TERM, 19 65

SUPREME COURT
APPELLATE TERM

FIRST JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

WILLIAM SPROWAL and STEVEN GORDON,
Defendants-Appellants.

OPINION BY

TILZER, J.

FILED
JAN 13 1966
APPELLATE TERM

I concur,

I concur,

I dissent and vote to dismiss the complaint against both defendants for the reasons stated in my dissenting Opinion

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT, JUNE, 1965

Present: — HON. GEORGE TILZER, J. P.
" WILLIAM C. HECHT, JR.,
" SAMUEL H. HOFSTADTER,
Justices.

- - - -

XEROX COPY

PUZZO, J.:

The defendant appeals from a judgment of the Criminal Court of the City of New York, County of New York, convicting them, after trial, of violating section 722-b of the Penal Law. Defendant Gordon was sentenced to serve five days imprisonment or to pay $50.00 and defendant Sprowal was sentenced to serve 60 days in the Workhouse.

Penal Law, section 722-b, entitled "Loitering in school buildings," provides:

> "Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct."

Patrolman Grunin testified that at 1:40 in the afternoon of May 29, 1964, while standing in front of the main entrance of the Charles Evans Hughes High School, he observed a group of some eight persons walking toward the school. The school

located on the north side of West 18th Street, in the middle of the block between Eighth and Ninth Avenues, Manhattan. There is no yard or fence between the school and the sidewalk, and the sidewalk is ten to twelve feet wide. Officer Gruntz inquired of defendant-appellant Sprowal what the group intended to do and Sprowal replied that they planned to distribute literature in front of the school. The officer then told Sprowal that it was not permissible to hand out such literature in front of the school; that they could distribute the leaflets on the corner or on another block, but that they could not interfere with the students coming in or out of the school. At the time between 250 and 500 students were leaving the school. At the front entrance to the school building was a sign reading, "No loitering. Persons found loitering in front of the building are subject to the charge of Disorderly Conduct."

For some 30 minutes the officer pleaded with the defendants to discontinue handing out the literature in front of the entrance to the school, not to block up the place and get out of the block as they were interfering with the dismissal of the students. Sprowal refused to move and sat down on the street. Four others, of the original group of eight, also refused to move away from the school and continued handing out literature, within five feet from the main entrance of the school, to some 200 students who were milling around the group.*

* The leaflets being distributed requested students to work with and join CORE and also requested support for a bill to establish an independent civilian board to review charges of improper police activities.

Gruntz then placed Sprowal and three of the others under arrest. The defendant-appellant Gordon in the meantime had moved 200-300 feet east of the school, where he continued handing out literature. Gruntz had a fellow officer summon Gordon to his side, and Gordon having refused to leave the block, was also placed under arrest. At this point, due to the pressure of the students emerging from the school, the officer and the defendants crossed to the south side of the street.

The trial court, in an oral opinion, found three of the defendants, who according to defense testimony never distributed literature on the school side of the street, not guilty of violating section 722-b. Defendants Sprowal and Gordon were found guilty of violating section 722-b. The court did not indicate whether it had accepted the People's or the defense's testimony concerning the position of defendant Gordon on West 18th Street.

It is against this background that we consider the various arguments of the appellants. A legitimate interpretation of section 722-b, in our view, is that the activities of the appellants (passing for the moment the question of whether the acts or conduct of each of the appellants were identical in kind) were not irrelevant to the purpose for which the statute was passed. While the Legislature was concerned primarily with preventing vandalism and assaults on pupils and teachers, it was also advised of the serious difficulties that school authorities

both within and without the City were having with gangs of young people coming into schools, frightening teachers and pupils, creating disturbances and "making nuisances of themselves in or about a public school" (Letter of Executive Secretary of New York State School Boards Associations, Inc., to Governor Dewey, March 31, 1954, in relation to bill that ultimately became section 722-b). The method chosen by the Legislature to protect the schools was a blanket prohibition against the presence of all unauthorized persons from the vicinity of school grounds. If leaflet distributors are excluded from the operation of section 722-b, then the ability of school authorities and police to protect pupils against the distribution of obscenity and narcotics in or about school premises will be impaired. The authorities will be forced to scrutinize every person near a school with leaflets in order to distinguish between those with leaflets only, and others who may have obscene matter and narcotics in addition to leaflets.

Nor do we find that the statute itself is void for vagueness and indefiniteness. The Court of Appeals held the section constitutional against attack on the same ground in People v. Johnson (6 N Y 2d 549). There Johnson actually invaded the school building and grounds of a country school. The fact that the activities of appellants took place on the street in front of the entrance of a New York City public school

does not thereby legitimatize their conduct. We must give to the statute a sensible construction with relation to the evils sought to be proscribed. The protection to be afforded pupils may not depend upon the circumstance that the school in one case embraces an area of many acres in a rural community while in another the school is devoid of grounds and fronts directly on a public street in a large city. The "section was designed to exclude from school areas degenerates, narcotic peddlers, vandals and the like" (dissenting opinion of Fuld, J., People v. Johnson, supra, at page 554). At least as applied to appellants' conduct some five feet from the main entrance to the school, the statute, in using the term "in or about" a school building, is not lacking in specificity (Cox v. Louisiana, 379 U.S. 536 [1965]).

Moreover, section 722-b does not impose a prior restraint on free speech. The restraint imposed by the statute is not one affecting speech. It places an absolute ban on the physical presence of unauthorized persons in the limited areas in or about school buildings. For that matter, the appellants failed to offer any proof of arbitrary or discriminatory application of the requirement of prior approval by the school authorities.

We too are concerned in protecting our citizens in their ancient right to use of the streets for the dissemination of information and opinion. This right, nevertheless, ranks no higher than other rights protected by the constitutions and

is subject to reasonable restrictions when necessary to safeguard the public interest. The right is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order (Hague v. C.I.O., 307 U.S. 515; People v. Stover, 12 N Y 2d 462, 469). It is our "delicate and difficult task" to weigh "the circumstances" and appraise "the substantiality of the reasons advanced in support of the regulation of the free enjoyment of" speech. (Schneider v. State, 308 U.S. 147, 161.)

It must be observed that the statute in the case at bar is not directed at freedom of speech. The fact that it may have a partial and incidental deterrent effect on free speech is justifiable and a necessary concession to the overriding public interest in the maintenance of order and the protection of pupils caused "by the presence of unauthorized persons invading the precincts of our schools such, for instance, as dope peddlers, sex offenders, idlers and trouble makers in general, and other persons harboring some illegitimate purpose involving the innocence of immature school children and youth." (People v. Johnson, supra, at page 552.) Moreover, appellants may not exercise this liberty by taking a stand directly in front of the main entrance of a school, forming a cordon which blocked the erupting mass of students. Prohibition of such conduct would not abridge the constitutional liberty. In order

to assure the safety and convenience of its citizens a state may regulate the times and places and the conduct of those using the streets to impart information through speech or distribution of literature. (Cantwell v. State of Connecticut, 310 U.S. 296, 304.) When those sought to be safeguarded are the youth of the community, any conflict arising between the remedy provided by the Legislature and First Amendment freedoms must be resolved in favor of the statute designed to insulate students from the dangers and evils enumerated. Because of their very youth and inexperience, their susceptibility and exposure to the vices of a large city, the measure of control which the state may exercise for the protection of school students is of much wider scope than that which might be exercised for the community at large. (Prince v. Massachusetts, 321 U.S. 158.)

It must be noted too that the statute impinges on the right to use the street for the dissemination of information in but a minor way. The proscription applies only to streets contiguous to school buildings. And even this forbidden area would be limited to the street in the immediate school area. The appellants before us, as well as their six companions could have achieved their goal of distributing literature to the students without violating the statute by moving to the corners of Eighth and Ninth Avenues, as suggested by the officer.

The interest of the State that its youth shall come to manhood in physical and moral health justifies the statute in issue. Such conclusion is not weakened by any fear that the statute will be utilized to impose a special restraint upon academic freedom. We would not shield our youth from the expression of ideas, even those repugnant to our own. But we would insist that this constitutional right, as all such rights, be exercised in consonance with peace and good order. If not, and if our young citizens be shown an example of disregard of law and apathy on the part of governmental authority, we will have failed in their education as to the true meaning of liberty and freedom. The exercise of a constitutional right cannot license an illegal act. "* * * The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. * * *" (Cox v. Louisiana, supra, at page 554.)

We have indicated earlier that it was impossible to ascertain from the oral opinion rendered by the trial court whether the determination of the defendant Gordon's guilt was

based upon a finding of fact that he stood 300 feet down the city block from the end of the school building and in front of an apartment house thirty feet from a corner, as the defense testified, or that he stood with the defendant Sprowal five feet from the main entrance to the high school, as the complaining officer testified. The defense testimony was at least partially accepted and the officer's rejected by the court by its judgment acquitting three defendants. If the defense testimony was accepted as to the defendant Gordon, since the statute, as we have also noted above, applies only to streets contiguous to school buildings and grounds in the immediate school area, the trial court erred in finding that Gordon violated section 722-b. As a matter of law, under the circumstances of this case, Gordon could not be said to have been loitering in or about a school building or grounds if he was distributing leaflets some 300 feet down the city block from the end of the school building. Accordingly, the judgment convicting the defendant Gordon of violating section 722-b of the Penal Law is reversed, the fine remitted and a new trial ordered.

With regard to the defendant Sprowal, it is urged that there was no possible justification for imposing a sentence of 60 days imprisonment on this appellant. Since an issue is raised in this regard and since Sprowal's criminal record is

properly to be considered on the question of sentence (Ethical Problems in the Performance of the Judicial Function, Hon. Charles D. Breitel, Associate Justice, Appellate Division, First Department, New York Law Journal, October 13, 1965, page 4), it is to be observed that Sprowal's criminal record in this State dates back to 1959. In 1959, 1960 and 1961 he was arrested and subsequently convicted for violations of the public health law with respect to narcotic drugs. In July of 1963, the sentencing court noted, Sprowal received two 30-day suspended sentences for obstructing a police officer and for disorderly conduct. The record in the circumstances does not disclose adequate reason to commend appellant to clement regard by an appellate court. The judgment convicting defendant Sprowal is affirmed.

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT, JUNE, 1965

Present: -- HON. GEORGE POSNER, J.P.,
" VINCENT A. BECKER, J.
" SAMUEL H. HOFSTADTER,
Justices.

- - - -

State of New York
Court of Appeals

BEFORE: HON. STANLEY H. FULD, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

WILLIAM SPROWAL,

Defendant-Appellant.

CERTIFICATE GRANTING LEAVE

BAIL

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §520 of the Code of Criminal Procedure permission is hereby granted to the above named appellant to appeal to the Court of Appeals.

I further certify that in my opinion there is reasonable doubt whether the judgment of conviction will stand upon appeal to the Court of Appeals.

Bail as at present provided is fixed pending appeal to the Court of Appeals in the sum of $500.

Dated at New York, New York
February 9, 1966.

Stanley H. Fuld
Associate Judge

Notice: Within 15 days from the date hereon an appeal must be taken and this certificate must be filed with the notice of appeal. An appeal is taken by filing in the clerk's office having the judgment roll (trial court) a written notice in duplicate that appellant appeals to the Court of Appeals (§522, Code Crim. Pro.) together with proof that another copy of the notice of appeal has been served upon opposing counsel (§521, Code Crim. Pro.). The appeal must be argued within 90 days from the date of the notice of appeal (§536, Code Crim. Pro.)

State of New York
Court of Appeals

BEFORE: HON. STANLEY H. FULD, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

STEVEN GORDON,

Defendant-Appellant.

CERTIFICATE GRANTING LEAVE

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §520 of the Code of Criminal Procedure permission is hereby granted to the above named appellant to appeal to the Court of Appeals.

Dated at New York, New York

February 9, 196 6.

Stanley H. Fuld
Associate Judge

Notice: Within 15 days from the date hereon an appeal must be taken and this certificate must be filed with the notice of appeal. An appeal is taken by filing in the clerk's office having the judgment roll (trial court) a written notice in duplicate that appellant appeals to the Court of Appeals (§522, Code Crim. Pro.) together with proof that another copy of the notice of appeal has been served upon opposing counsel (§521, Code Crim. Pro.). The appeal must be argued within 90 days from the date of the notice of appeal (§536, Code Crim. Pro.)

CRIMINAL COURT OF THE CITY OF NEW YORK

County of New York

The People of the State of New York	:	
Plaintiff-Respondent	:	Notice of Appeal
vs.	:	Docket No. C11353-11356
William Sprowal and Steven Gordon	:	
Defendants-Appellants.	:	

PLEASE TAKE NOTICE, that, pursuant to permission granted by the orders annexed hereto of the Honorable Stanley H. Fuld, Associate Judge of the Court of Appeals, made on the 9th day of February 1966, the defendants above named hereby appeal to the Court of Appeals from the order and judgment of the Appellate Term, First Judicial Department, made and entered on the 13th day of January 1966, relating to the judgment of the Criminal Court of the City of New York, County of New York, convicting the defendants, after trial, of the offense of disorderly conduct under Section 722-b of the Penal Law; said order and judgment affirming said judgment convicting the defendant Sprowal and reversing said judgment convicting the defendant Gordon and, as to Gordon, ordering a new trial.

Dated:

This 23rd day
of February 1966.

Lloyd McAulay

Lloyd McAulay, Esq.
Room 1925
165 Broadway
New York, N. Y. 10006
WOrth 4-7030

To: Frank S. Hogan, Esq.
District Attorney
of New York County

Clerk of the Criminal Court
of New York City
County of New York

State of New York,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh *day of* July *A. D. 196*6.

Present, HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

No. No. 694

The People &c.,

Respondent,

vs.

William Sprowal,

Appellant.

A motion for reargument or, in the alternative, to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: The defendant contended that section 722-b of the Penal Law of the State of New York, as applied to him, violated his rights under the First and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals held that no rights of defendant under these amendments were violated.

AND the Criminal Court of the City of New York hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Joseph Kimball

Deputy Clerk

CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,	:	
Respondent,	:	
-against-	:	Docket # C11353-11356
WILLIAM SPROWAL,	:	
Defendant-Appellant.	:	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

I. Notice is hereby given that WILLIAM SPROWAL, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York denying appellant's motion for reargument of this case, entered herein on the 7th day of July, 1966, and from the order affirming the judgment of conviction, entered herein on the 9th day of June, 1966.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Appellant was convicted of the offense of "Loitering in School Buildings" without consent of the principal in violation of §722-b of the Penal Law of the State of New York; was sentenced to 60 days in the workhouse, and is presently enlarged on bail in the sum of $500.00 (Five Hundred Dollars).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) The entire record before the Court of Appeals of the State of New York.

(b) All additional orders of the Court of Appeals and all motion papers before said Court.

III. The following questions are presented by this appeal:

(a) Whether by interpreting term "Loitering" in a statute entitled "Loitering in School Buildings" in such a way as to apply the statute to one peacefully distributing leaflets on a public street, the statute has been rendered unconstitutionally vague in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States.

(b) Whether the application of a "Loitering" statute to one peacefully distributing leaflets on a public street was an unconstitutional application of the statute in violation of the First Amendment to the Constitution of the United States.

(c) Whether the delegation to a public official of discretion as to who may and who may not distribute literature on a public street adjoinging a public school, under the facts in this case, renders the statute unconstitutionally vague on its face in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

CARL RACHLIN
Attorney for William Sproual,
Appellant

150 Nassau Street
New York, New York 10038

DATED: New York, New York
October 3rd, 1966

Argued by
FREDERICK P. HAFETZ

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

WILLIAM SPROWAL,
Defendant-Appellant.

RESPONDENT'S BRIEF

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
RE 2-7300

H. RICHARD UVILLER
FREDERICK P. HAFETZ
Assistant District Attorneys
Of Counsel

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Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

WILLIAM SPROWAL,
Defendant-Appellant.

RESPONDENT'S BRIEF

Statement

This is an appeal from an order of the Appellate Term, First Department, rendered January 13, 1966, affirming the judgment of the Criminal Court of the City of New York, County of New York, rendered November 10, 1964, convicting the defendant, after trial (LEVY, J.), of the offense of LOITERING IN A SCHOOL BUILDING (Penal Law §722-b, and sentencing him to sixty days in the Workhouse.

Introduction

Ignoring repeated police requests to distribute his leaflets away from the main entrance area of Charles Evans Hughes High School, the defendant Sprowal defiantly re-

mained there, distributing to several hundred students milling around him. Finally, after scorning the officer's reasonable request for a period of one-half hour, Sprowal, together with four others who were also distributing leaflets, was arrested for "loitering * * * about a school building" in violation of Section 722-b of the Penal Law. At trial Sprowal and one of his confederates, Steven Gordon, were convicted of this offense, and their three co-defendants acquitted (LEVY, J.).

The Appellate Term, First Department, affirmed Sprowal's conviction, and as to Gordon, reversed the judgment and ordered a new trial. Sprowal and Gordon then jointly applied for leave to appeal to this Court, and their application was granted by order dated February 9, 1966 (FULD, J.). Subsequently, Gordon applied to this Court to withdraw his appeal; the application was granted by order dated April 20, 1966; the People then moved in Criminal Court to dismiss the complaint pending against Gordon and the motion was granted (April 22, 1966).

On appeal Sprowal contends: (1) that as a matter of law the People's evidence was insufficient to warrant conviction; (2) that Section 722-b as applied is void for vagueness; (3) that the statute as applied infringes his rights under the First and Fourteenth Amendments; (4) that the statute imposes an unconstitutional prior restraint on speech; (5) that his sentence was excessive. The claims are without merit.

The Statute Involved

Section 722-b of the Penal Law provides:

"Loitering in school buildings.

"Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct."

The Opinion Below

The Appellate Term of the Supreme Court, First Department, affirmed the judgment convicting the defendant Sprowal, and reversed the judgment convicting the defendant Gordon and ordered a new trial. Presiding Justice TILZER delivered the opinion of the court, concurred in by Justice HECHT. Justice HOFSTADTER dissented in a separate opinion. Both opinions are reproduced in the appendix to this brief.

THE EVIDENCE

The People's Case

Patrolman **Raymond Gruntz** testified that on the afternoon of May 29, 1964, he was on duty at the Charles Evans Hughes High School, located on West 18th Street between Eighth and Ninth Avenues (9).* The school building was

* References, unless otherwise indicated, are to the typewritten minutes of the trial.

directly adjacent to the sidewalk and was not bordered by a fence or yard. Above the main entrance was posted a sign stating that loitering in front of the building was prohibited (29).

At about 1:10 p.m., as school was recessing for the day, a group including the defendant Sprowal and his four codefendants at trial—none of whom were students or parents of students in the school (29, 30)—walked toward the main entrance of the building (10, 17). Approaching the group, Patrolman Gruntz asked the defendant Sprowal what their purpose was and he replied that they intended to distribute literature to students in front of the school (10). The officer told them that such act would be loitering in violation of Section 722-b of the Penal Law; that they could distribute their literature at the corner of another block, but not in front of the school (10-12).

While the officer addressed them, the group began distributing leaflets* to more than one hundred students who had gathered around them (12, 17). Replying to the officers, Sprowal said, "I refuse to move out of this block" (13). Again, Patrolman Gruntz directed the group to move away from the school, but they remained there, distributing leaflets (13). At this point the officer entered the school to telephone for assistance (13). Returning to the street a few minutes later, he saw the defendant Sprowal and the four codefendants standing in a circle on the sidewalk about five feet from the main entrance to the school and distrib-

* The leaflets being distributed requested students to work with and join CORE and also requested support for a bill to establish an independent civilian board to review charges of improper police activities.

uting leaflets to about two hundred students "milling around" them (18, 23-4).

Sprowal and his four codefendants remained in approximately the same position, surrounded by students, for the next twenty-five minutes at which time Gruntz received assistance (13, 25). He then placed Sprowal under arrest and again told the rest of the group to leave the block (14). Upon the refusal of codefendants Abel, Siderellis, and Lanier to do so, Gruntz arrested them (14-15).

Meanwhile, after Sprowal's arrest, codefendant Gordon had walked to a point approximately fifty to two hundred feet east of the school building where he continued distributing leaflets (15, 25-6). Gruntz dispatched one of the assisting officers to bring back Gordon (15). When Gordon returned with the officer, Gruntz told him to leave the block (16). Gordon refused, stating he was going to stay with Sprowal, whereupon Gruntz placed him under arrest (16).

The Defense

The defendant, **William Sprowal**, a CORE worker, testified that on the afternoon in question as he and seven others, including the four codefendants, approached the Charles Evans Hughes High School, they were met by Patrolman Gruntz (32-3). Questioned by the officer as to their purpose, Sprowal replied that it was to distribute leaflets (34). After examining some of the leaflets that the group carried, Gruntz told them, "You can't distribute leaflets here" (34). Sprowal then told the others that if any one were to be arrested, it would be him, and that they should move across the street from the school (34).

Lanier, Siderellis and Abel did as Sprowal directed while Sprowal remained at the entrance to the school and Gordon moved down the street away from the entrance (34). At these positions they began distributing leaflets to students coming out of school (36-8).

About ten minutes later Gruntz approached co-defendants Abel and Siderellis and told them that they were under arrest (35, 38). Walking over to the officer, Sprowal asked him the reason for the arrests (35). Replying that the arrests were for distributing leaflets, Gruntz told Sprowal that he would be arrested if he did not move (35). Sprowal refused and he also was placed under arrest (35). Gruntz then dispatched another officer who had arrived on the scene to summon Gordon from his position down the street; Gordon was brought to him and placed under arrest (35-6).

Codefendants **Steven Gordon**, **James Lanier**, **Mary Ann Siderellis** and **Kathryn Abel** testified that on the afternoon in question only the defendant Sprowal distributed leaflets to students near the main entrance of the Charles Evans Hughes High School (52, 76, 90); that Gordon distributed leaflets at a corner on the same side of the street as the school, a great distance from the building (52, 76-7); that Lanier, Siderellis and Abel distributed leaflets across the street from the school building (50, 83, 88).

POINT I

The defendant's guilt was proved beyond a reasonable doubt [answering defendant's brief, Points I-IV].

On a May afternoon, as Charles Evans Hughes High School recessed for the day, the defendant Sprowal, neither a parent nor a guardian of any student in the school, positioned himself on the sidewalk about five feet from the main entrance of the building and began distributing leaflets to students emerging from the school. For the next half-hour, the defendant—ignoring both a sign posted over the main entrance prohibiting loitering in front of the building and repeated requests by a police officer to move—persisted there, distributing the leaflets to several hundred students who gathered around him.

Defendant's conduct unquestionably constituted "loitering * * * in or about any school building" within the meaning of Section 722-b of the Penal Law as construed by this Court in *People* v. *Johnson*, 6 N. Y. 2d 549 (1959). There, the defendant, neither a parent nor guardian of a student in the school, and having no written permission from the principal to be in the school, waited fifteen minutes outside a classroom for a friend who was inside, finishing his last class of the day. Sustaining Johnson's Section 722-b conviction on these facts, this Court held that defendant's failure to "come within the statutory exceptions"—parentship or guardianship of a student—and his lack of "permission to enter the school premises and this in face of a prior warning to keep out" rendered his presence in the

building "loitering" in violation of the statute [*id.* at 553]. Similarly, the statutory exceptions are inapplicable here and the requirements of proof under Section 722-b, as construed in *Johnson*, were amply satisfied.

Struggling to distinguish *Johnson*, the defendant points to the fact that conviction there was obtained under that part of the statute prohibiting loitering "in" a school building, whereas the instant convictions were founded on the statute's disjunctive proscription of loitering "about" a school building. The word "about," claims defendant, is so lacking in specificity as to render the statute as applied to their conduct unconstitutionally vague (brief, pp. 6, 19-21). The prepositional quarrel is without merit. Recently, the Supreme Court in *Cox* v. *Louisiana*, 379 U. S. 570 (1965), reviewed the constitutionality of a statute prohibiting picketing "near" a courthouse as applied to such activity 125 feet from a courthouse. The Court held:

> "[T]he lack of specificity in a word such as 'near' * * * [did] not render the statute unconstitutionally vague, at least as applied to a demonstration within the sight and hearing of those in the courthouse" [*id.* at 568].

Certainly, the word "about" possesses no less specificity than the word "near." Thus, here, as in *Cox*, the statute is not vague as applied to conduct "within the sight and hearing" of the building in question [see *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939)]. Indeed, the assertion of vagueness here has even less merit than in *Cox*, for the statutory application in question is to conduct only five feet from the entrance to the school, in contrast to the far greater distance involved in *Cox*.

That defendant's conduct falls within the statute's purpose is persuasively demonstrated in the opinion of the court below.* The primary concern of the legislature in passing Section 722-b, as the Appellate Term opinion correctly noted, was the frequent presence in the school area of dope peddlers, sex offenders, vandals, and persons "making nuisances of themselves" [Appendix, pp. 3-4]. Discussing the remedy chosen by the legislature, the Appellate Term opinion properly concluded that Section 722-b was "designed to insulate students from the dangers and evils" by "a blanket prohibition against the presence of all unauthorized persons from the vicinity of the school grounds" (*id.* at pp. 4, 6).

Plainly, defendant's prolonged presence several feet from the main entrance to the school was "unauthorized," thus within the purpose of the statutory proscription. Emblazoned over the entrance in clear view of the defendant was a "no loitering" sign. A police officer, ascertaining that Sprowal intended to stand at the school entrance and distribute leaflets, informed the defendant at the outset that his presence there was unlawful, and repeated this admonition continuously for the next half-hour. Dispelling any question that Sprowal's presence was "unauthorized," thus in violation of the statute, was his own testimony that he attempted to have his confederates comply with the law by dispersing them from his side at the school entrance. To exclude Sprowal's "unauthorized" presence from the legislature's "blanket prohibition" of such persons from the school area would, as the Appellate Term justly pointed

* That opinion is set out in the Appendix to this brief.

out, impair the legislative purpose by forcing the authorities:

> "to scrutinize every person near a school with leaflets in order to distinguish between those with leaflets only, and others who may have obscene matter and narcotics in addition to leaflets" [*id.* at p. 4].

Unfounded is defendant's contention that if his conduct does fall within the legislative purpose, then the statute as applied infringes his constitutional right to disseminate information. To begin with, and most obvious, as noted by the Appellate Term, the statute has no concern with prohibiting First Amendment activity [*id.* at p. 6]. Absent here is the odious and oft-condemned ordinance banning all leaflet distribution in public streets [see *e.g. Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Hague* v. *CIO,* 307 U. S. 496 (1939); *Schneider* v. *State,* 308 U. S. 147 (1939)]. Rather, the statute here is a narrowly drawn proscription as to an insignificant portion of the public way, only incidentally affecting freedom of speech [see *Cox* v. *Louisiana,* 379 U. S. 550 (1965)]. This minor restriction left the defendant free, as the police officer suggested, to distribute his leaflets any place on the school block outside of the immediate vicinity of the school building, thus fully enabling him to reach his intended audience. Significantly, the codefendants who distributed leaflets directly across the street from the school were acquitted. Their acquittal graphically reveals the insignificant effect of the statute's restriction of leaflet distributors.

The Supreme Court has consistently held that narrowly drawn regulations affecting the time, place or manner of

disseminating information in public places are valid exercises of the police power so long as substantial reason exists for the regulation [*Schneider* v. *State,* 308 U. S. 147 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Cox* v. *New Hampshire,* 312 U. S. 569 (1940); *Kouces* v. *Cooper,* 336 U. S. 77 (1948); *Poulos* v. *New Hampshire,* 345 U. S. 395 (1953); *Cox* v. *Louisiana,* 379 U. S. 562 (1965)].

The criterion of substantiality of purpose may best be illuminated by contrasting legislative objectives that have been held substantial enough to justify regulation of constitutionally protected activity, with purposes deemed insufficient to support such regulation. In the former category are: protecting the "tranquility of residential areas" [*Kovacs* v. *Cooper,* 336 U. S. 77 (1948)]; protecting the health of the community [*Jacobson* v. *Massachusetts,* 197 U. S. 11 (1905)]; maintaining highway safety [*Cox* v. *New Hampshire,* 312 U. S. 569 (1941)]; preventing traffic disruption on business streets [*Kovacs* v. *Cooper, supra*]; avoiding strife between industrial disputants [*Gibboney* v. *Empire Ice and Storage Co.,* 336 U. S. 490 (1949); see *Thornhill* v. *Alabama,* 310 U. S. 88 (1940)]; maintaining efficiency of public employees [*United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947)]; satisfying the "aesthetic" needs of the community [*People* v. *Stover,* 12 N. Y. 2d 462 (1963), cert. den. 375 U. S. 42 (1963)]. On the other hand, legislative objectives lacking the requisite substantiality include: keeping the streets litter-free [*Lovell* v. *Griffin,* 303 N. S. 444 (1938); *Schneider* v. *State,* 308 U. S. 147, *supra*]; protecting home dwellers against disturbance by itinerant preachers [*Martin* v. *City of Struthers,* 319 U. S. 141 (1943)]; protecting home-dwellers against fraudulent ap-

peals in the name of charity and religion [*Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); see *Schneider* v. *State*, *supra*].

When, as in *American Association* v. *Donds*, 339 U. S. 382, 401 (1950), the statute in question "is compared with ordinances and regulations dealing with littering of the streets or disturbance of householders by itinerant preachers, the relative significance and complexity of the problem" focused on by the legislature "becomes at once apparent." The indisputable purpose of Section 722-b, as stated by this Court in *People* v. *Johnson*, 6 N. Y. 2d 549, 552 (1959), was guarding the "moral and physical safety and well-being" of "immature school children" [*People* v. *Johnson*, *supra* at 552]. Comparison of this vital purpose with the above legislative objectives pales not only those deemed insubstantial, but also many whose substantiality was sanctioned. For example, tranquillity of residential neighborboods, orderly traffic on business streets, community beauty, efficiency of public servants—objectives all passing constitutional scrutiny, all unquestionably desirable—are hardly as central to the public weal as is the protection of tender-aged youth from those who would prey on them.

Indeed, exercise of the state's police power specifically for the well-being of children is accorded wider scope than that allowed for general police power enactment [*Prince* v. *Massachusetts*, 321 U. S. 158 (1943); see *Butler* v. *Michigan*, 352 U. S. 380 (1957); *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964); *People* v. *Bookcase, Inc.*, 14 N. Y. 2d 409 (1964); *People* v. *Kahan*, 15 N. Y. 2d 311 (1965)]. This priority of

legislation designed for the safety and welfare of children was well-expressed by the Supreme Court in *Prince* v. *Massachusetts, supra* at 168-9:

> "A democratic society rests for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure that against impeding restraints and dangers within a broad range of selection. Among evils most appropriate for such action are * * * the possible harms arising from activities subject to all the diverse influence of the street."

Equally unfounded is defendant's contention that since Section 722-b authorizes the presence in the school area of a person having a "written permission" from the school authorities, then the statute imposes an unconstitutional "prior restraint" on speech (brief, pp. 18-19).

The simple and complete answer to this assertion, as the Appellate Term opinion discerned, is that the statute imposes no prior restraint on speech. Prior restraint hinges the exercise of a First Amendment right upon an advance governmental approval [see *e.g., Lovell* v. *Griffin,* 303 U. S. 444 (1939); *Hague* v. *CIO,* 307 U. S. 496 (1939)]. Its evil is that of government censorship of expression [*Near* v. *Minnesota,* 283 U. S. 697 (1931); *Saia* v. *New York,* 334 U. S. 558 (1948)]. The legislature, as the Appellate Term properly noted, did not contemplate leaflet distributors within the category of persons to whom "written permission" could be extended. Such persons were left free to carry out their purpose any place on the school block outside the immediate school area.

In any case, even if Section 722-b as applied to defendants is construed to be a prior restraint on First Amendment activity, this Court may deem it a valid one. In determining the constitutionality of that restraint, this Court is "guided by the strong constitutional presumption attending legislative enactments * * * that the statute was not intended to unreasonably restrict or inhibit * * * 'liberty' protected by due process" [*People* v. *Finkelstein*, 9 N. Y. 2d 342 at 344 (1961)]. And, this Court must construe the statute in such a way, if possible, as to preserve its validity [McKinney's Cons. Laws of N. Y., Book 1, Statutes, §150; *People* v. *Finkelstein, supra, Lyons* v. *Goldstein*, 290 N. Y. 19 (1943)].

The Supreme Court has held that prior restraints on public dissemination of information are constitutional provided that the licensing power vested in government officials is an "appropriate, limited discretion, * * * concerning the time, place, direction or manner of use of the streets" [*Cox* v. *Louisiana*, 379 U. S. 553 at 558 (1965); also see *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953); *Times Film Corporation* v. *Chicago*, 365 U. S. 43 (1961)].

Assuming that Section 722-b empowers school authorities to permit handbill distribution, certainly it is a reasonable construction of the legislative intent that the power be exercised with "appropriate, limited discretion" [*Cox* v. *Louisiana, supra* at 558], rather than with constitutionally impermissible "unbridled discretion" [*id.* at 557]. In no

way does it defeat the legislative purpose in Section 722-b —if construed to provide for "written permission" for handbill distributors—for this Court to regard the school authorities' power as limited to fixing "the time, place, duration or manner of use of the streets" [*Cox* v. *Louisiana, supra* at 558]. Enabled to fix the conditions of distribution, the authorities could insure their presence at the points of distribution at the appropriate time—*e.g.*, when the children enter school in the morning—thus overseeing the distribution and guarding the safety of the children. By construing the statute in this manner, clearly a reasonable course, this Court will preserve its constitutionality.

Analogously, in *Cox* v. *New Hampshire,* 312 U. S. 569 (1941), the Supreme Court reviewed the constitutionality of an ordinance requiring a license to parade, which, like the statute here in question, contained no limitations on the discretion vested in the licensing officials. The high court of New Hampshire, construing the ordinance to preserve its constitutionality, had viewed the discretion lodged in the municipal officials as limited to considerations of time, place and manner [*State* v. *Cox,* 91 N. H. 137 16 A. 2d 508 (1940)]. Sustaining the statute against a claim of unconstitutional prior restraint, the Supreme Court held that the limited authority conferred by the statute, as construed by the state court, was a valid restraint. No less valid is the restraint in Section 722-b if construed by this Court to confer only a limited discretion in school authorities.

POINT II

This Court lacks power to review the appropriateness of Sprowal's sentence [answering defendant's brief, Point V].

Defendant Sprowal contends that the sentencing court abused its discretion in imposing on him a term of sixty days' imprisonment. However, this Court has held that it lacks the power to review the appropriateness of a discretionary sentence [*People* v. *Speiser,* 277 N. Y. 342 (1938); *People* v. *Rytel,* 384 N. Y. 242 (1940)]. And, in any case, even were the sentence reviewable in this forum, Sprowal's prior criminal record amply justified the propriety of the sentence imposed. That record, summarized in the opinion of the Appellate Term (Appendix, p. 9), reveals four prior convictions—three narcotics charges, and one disorderly conduct violation. Clearly, the sentencing court did not abuse its discretion in imposing a sentence only one-third of the six months' maximum permitted [Penal Law §723].

Conclusion

The judgment of conviction should be affirmed.

Respectfully submitted,

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April, 1966

APPENDIX

Appendix

The Opinions of the Appellate Term, First Department

Majority Opinion by Tilzer, J.

The defendants appeal from a judgment of the Criminal Court of the City of New York, County of New York, convicting them, after trial, of violating section 722-b of the Penal Law. Defendant Gordon was sentenced to serve five days imprisonment or to pay $50.00 and defendant Sprowal was sentenced to serve 60 days in the Workhouse.

Penal Law, section 722-b, entitled "loitering in school buildings," provides:

> "Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct."

Patrolman Gruntz testified that at 1:40 in the afternoon of May 29, 1964, while standing in front of the main entrance of the Charles Evans Hughes High School, he observed a group of some eight persons walking toward the school. The school is located on the north side of West 18th Street, in the middle of the block between Eighth and Ninth Avenues, Manhattan. There is no yard or fence be-

tween the school and the sidewalk, and the sidewalk is ten to twelve feet wide. Officer Gruntz inquired of defendant-appellant Sprowal what the group intended to do and Sprowal replied that they planned to distribute literature in front of the school. The officer then told Sprowal that it was not permissible to hand out such literature in front of the school; that they could distribute the leaflets on the corner or on another block, but that they could not interfere with the students coming in or out of the school. At the time between 250 and 500 students were leaving the school. At the front entrance to the school building was a sign reading, "No loitering. Persons found loitering in front of the building are subject to the charge of Disorderly Conduct."

For some 30 minutes the officer pleaded with the defendants to discontinue handing out the literature in front of the entrance to the school, not to block up the place and get out of the block as they were interfering with the dismissal of the students. Sprowal refused to move and sat down on the street. Four others, of the original group of eight, also refused to move away from the school and continued handing out literature, within five feet from the main entrance of the school, to some 200 students who were milling around the group.* Gruntz then placed Sprowal and three of the others under arrest. The defendant-appellant Gordon in the meantime had moved 200-300 feet east of the

* The leaflets being distributed requested students to work with and join CORE and also requested support for a bill to establish an independent civilian board to review charges of improper police activities.

school, where he continued handing out literature. Gruntz had a fellow officer summon Gordon to his side, and Gordon having refused to leave the block, was also placed under arrest. At this point, due to the pressure of the students emerging from the school, the officer and the defendants crossed to the south side of the street.

The trial court, in an oral opinion, found three of the defendants, who according to defense testimony never distributed literature on the school side of the street, not guilty of violating section 722-b. Defendants Sprowal and Gordon were found guilty of violating section 722-b. The court did not indicate whether it had accepted the People's or the defense's testimony concerning the position of defendant Gordon on West 18th Street.

It is against this background that we consider the various arguments of the appellants. A legitimate interpretation of section 722-b, in our view, is that the activities of the appellants (passing for the moment the question of whether the acts or conduct of each of the appellants were identical in kind) were not irrelevant to the purpose for which the statute was passed. While the Legislature was concerned primarily with preventing vandalism and assaults on pupils and teachers, it was also advised of the serious difficulties that school authorities both within and without the City were having with gangs of young people coming into schools, frightening teachers and pupils, creating disturbances and "making nuisances of themselves in or about a public school" (Letter of Executive Secretary of New State School Boards Associations, Inc., to Gover-

nor Dewey, March 31, 1954, in relation to bill that ultimately became section 722-b). The method chosen by the Legislature to protect the schools was a blanket prohibition against the presence of all unauthorized persons from the vicinity of school grounds. If leaflet distributors are excluded from the operation of section 722-b, then the ability of school authorities and police to protect pupils against the distribution of obscenity and narcotics in or about school premises will be impaired. The authorities will be forced to scrutinize every person near a school with leaflets in order to distinguish between those with leaflets only, and others who may have obscene matter and narcotics in addition to leaflets.

Nor do we find that statute itself is void for vagueness and indefiniteness. The Court of Appeals held the section constitutional against attack on the same ground in People v. Johnson (6 N. Y. 2d 549). There Johnson actually invaded the school building and grounds of a country school. The fact that the activities of appellants took place on the street in front of the entrance of a New York City public school does not thereby legitimatize their conduct. We must give to the statute a sensible construction with relation to the evils sought to be proscribed. The protection to be afforded pupils may not depend upon the circumstance that the school in one case embraces an area of many acres in a rural community while in another the school is devoid of grounds and fronts directly on a public street in a large city. The "section was designed to exclude from school areas degenerates, narcotics peddlers, vandals and the

like'' (dissenting opinion of Fuld, J., People v. Johnson, supra, at page 554). At least as applied to appellants' conduct some five feet from the main entrance to the school, the statute, in using the term ''in or about'' a school building, is not lacking in specificity (Cox v. Louisiana, 379 U. S. 536 [1965]).

Moreover, section 722-b does not impose a prior restraint on free speech. The restraint imposed by the statute is not one affecting speech. It places an absolute ban on the physical presence of unauthorized persons in the limited areas in or about school buildings. For that matter, the appellants failed to offer any proof of arbitrary or discriminatory application of the requirement of prior approval by the school authorities.

We too are concerned in protecting our citizens in their ancient right to use of the streets for the dissemination of information and opinion. This right, nevertheless, ranks no higher than other rights protected by the constitutions and is subject to reasonable restrictions when necessary to safeguard the public interest. The right is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order (Hague v. C. I. O., 307 U. S. 515; People v. Stover, 12 N. Y. 2d 462, 469). It is our ''delicate and difficult task'' to weigh ''the circumstances'' and appraise ''the substantiality of the reasons advanced in support of the regulation of the free enjoyment of'' speech. (Schneider v. State, 308 U. S. 147, 161.)

Appendix

It must be observed that the statute in the case at bar is not directed at freedom of speech. The fact that it may have a partial and incidental deterrent effect on free speech is justifiable and a necessary concession to the overriding public interest in the maintenance of order and the protection of pupils caused "by the presence of unauthorized persons invading the precincts of our schools such, for instance as dope peddlers, sex offenders, idlers and trouble makers in general, and other persons harboring some illegitimate purpose involving the innocence of immature school children and youth." (People v. Johnson, supra, at page 552.) Moreover, appellants may not exercise this liberty by taking a stand directly in front of the main entrance of a school, forming a cordon which blocked the erupting mass of students. Prohibition of such conduct would not abridge the constitutional liberty. In order to assure the safety and convenience of its citizens a state may regulate the times and places and the conduct of those using the streets to import information through speech or distribution of literature. (Cantwell v. State of Connecticut, 310 U. S. 296, 304.) When those sought to be safeguarded are the youth of the community, any conflict arising between the remedy provided by the Legislature and First Amendment freedoms must be resolved in favor of the statute designed to insulate students from the dangers and evils enumerated. Because of their very youth and inexperience, their susceptibility and exposure to the vices of a large city, the measure of control which the state may exercise for the protection of school students is of much wider scope than that which might be exercised for the community at large. (Prince v. Massachusetts, 321 U. S. 158).

It must be noted too that the statute impinges on the right to use the street for the dissemination of information in but a minor way. The proscription applies only to streets contiguous to school buildings. And even this forbidden area would be limited to the streets in the immediate school area. The appellants before us, as well as their six companions could have achieved their goal of distributing literature to the students without violating the statute by moving to the corners of Eighth and Ninth Avenues, as suggested by the officer.

The interest of the State that its youth shall come to manhood in physical and moral health justifies the statute in issue. Such conclusion is not weakened by any fear that the statute will be utilized to impose a special restraint upon academic freedom. We would not shield our youth from the expression of ideas, even those repugnant to our own. But we would insist that this constitutional right, as all such rights, be exercised in consonance with peace and good order. If not, and if our young citizens be shown an example of disregard of law and apathy on the part of governmental authority, we will have failed in their education as to the true meaning of liberty and freedom. The exercise of a constitutional right cannot license an illegal act. "* * * The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which

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liberty itself would be lost in the excesses of anarchy * * *'' (Cox v. Louisiana, supra, at page 554).

We have indicated earlier that it was impossible to ascertain from the oral opinion rendered by the trial court whether the determination of the defendant Gordon's guilt was based upon a finding of fact that he stood 300 feet down the city block from the end of the school building and in front of an apartment house thirty feet from a corner, as the defense testified, or that he stood with the defendant Sprowal five feet from the main entrance to the high school, as the complaining officer testified. The defense testimony was at least partially accepted and the officer's rejected by the court by its judgment acquitting three defendants. If the defense testimony was accepted as to the defendant Gordon, since the statute, as we have also noted above, applies only to streets contiguous to school buildings and grounds in the immediate school area, the trial court erred in finding that Gordon violated section 722-b. As a matter of law, under the circumstances of this case, Gordon could not be said to have been loitering in or about a school building or grounds if he was distributing leaflets some 300 feet down the city block from the end of the school building. Accordingly, the judgment convicting the defendant Gordon of violating section 722-b of the Penal Law is reversed, the fine remitted and a new trial ordered.

With regard to the defendant Sprowal, it is urged that there was no possible justification for imposing a sentence of 60 days imprisonment on this appellant. Since an issue

is raised in this regard and since Sprowal's criminal record is properly to be considered on the question of sentence (Ethical Problems in the Performance of the Judicial Function, Hon. Charles D. Breitel, Associate Justice, Appellate Division, First Department, New York Law Journal, October 13, 1965, page 4), it is to be observed that Sprowal's criminal record in this State dates back to 1959. In 1959, 1960 and 1961 he was arrested and subsequently convicted for violations of the public health law with respect to narcotic drugs. In July of 1963, the sentencing court noted, Sprowal received two 30-day suspended sentences for obstructing a police officer and for disorderly conduct. The record in the circumstances does not disclose adequate reason to commend appellant to clement regard by an appellate court. The judgment convicting defendant Sprowal is affirmed.

Appendix

SUPREME COURT

APPELLATE TERM—FIRST DEPARTMENT

June, 1965

Present:

Hon. GEORGE TILZER, J.P.
" WILLIAM C. HECHT, JR.,
" SAMUEL H. HOFSTADTER,
Justices.

No. 243

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

WILLIAM SPROWAL and STEVEN GORDON,
Defendants-Appellants.

Appeal by defendants from a judgment of conviction of the Criminal Court of the City of New York, County of New York, convicting them after trial, of violating section 722-b of the Penal Law.

Frank S. Hogan, District Attorney, New York County,
(Frederick P. Hafetz, Assistant District Attorney, of counsel)
Attorney for Respondent.

Lloyd McAuley, Esq., New York City
Attorney for Defendants-Appellants.

Appendix

Dissenting Opinion by Hofstadter, J.

Defendant Sprowal was distributing CORE leaflets on the sidewalk in front of a school. Defendant Gordon was apparently doing the same some 200 to 300 feet from the school. Charged with congregating with others on a public street and refusing to move on when ordered by the police (Penal Law, §722 [3]) and with loitering in or about a school building (Penal Law, §722-b), they were acquitted of the first charge and found guilty of the second. Three others of the group, arrested at the same time, were acquitted of both charges. In my judgment, section 722-b is not applicable to the fact pattern before us; if deemed applicable, it is, to that extent, unconstitutional. I would reverse the convictions and dismiss the compaint.

I cannot agree that a citizen's right to use the streets for the dissemination of information ranks no higher than other rights protected by the constitutions. The First Amendment is the "matrix, the indispensable condition of nearly every other form of freedom" (Palko v. Connecticut, 302 U. S. 319, 327). Its guarantees of freedom of speech, of press, of the people to assemble peacefully and to petition for the redress of grievances, were the first of the Billl of Rights to be secured from State abridgment by the "due process" clause of the Fourteenth Amendment (DeJonge v. Oregon, 299 U. S. 353; Grosjean v. American Press Co., 297 U. S. 233; Gitlow v. New York, 268 U. S. 652; Hague v. C. I. O., 307 U. S. 496, 515; see, also, Steelworkers v. Labor Board, 376 U. S. 492 and Sullivan v. Times, 375

U. S. 803), "All have preferred position in our basic scheme" (Prince v. Commonwealth of Massachusetts, 321 U. S. 158, 164). The counterpart of the great canon is to be found in our State Constitution—Art. I, §§8, 9.

Nor may I equate the enforcement of child labor laws, as in Prince v. Commonwealth of Massachusetts, supra, with the distribution of literature on the sidewalk (see: Shuttleworth v. City of Birmingham, 34 L. W. 4009, 4010). Defendants were not loitering in a school building, as was the case in People v. Johnson, 6 N. Y. 2d 549; the element of trespass is wholly lacking. They were exercising fundamental rights on a public street (Hague v. C. I. O., supra, 307 U. S. 496, 515; Lovell v. Griffin, 303 U. S. 444; see, also, Martin v. Struthers, 319 U. S. 141; Jamison v. Texas, 318 U. S. 413). Their design was proper—not illegal or illicit (Giboney v. Empire Storage Co., 336 U. S. 490).

It is one thing to enter a school building or its grounds without permission or legitimate purpose. It is quite another to distribute a petition on the street. To authorize limitation upon free communication between citizens on a public highway, the facts must disclose an evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that specific conduct be limited or forbidden (Cox v. Louisiana, 379 U. S. 559; Edwards v. South Carolina, 372 U. S. 229, 236-237).

Penal Law, section 722-b, is not such a statute. Nor, in my opinion, was it intended to cover the dissemination of handbills in the vicinity of a school (see: People v. Den-

nis, 208 N. Y. S. 2d 522). If construed to encompass such activity, the section would come into fatal collision with the constitutional prohibitions already mentioned (see also: Cantwell v. Connecticut, 320 U. S. 296, 304, 307; Schneider v. New Jersey, 308 U. S. 147, 161). For, as noted regulation of conduct may not be so broadly framed as to stifle freedom of speech (Shuttleworth v. City of Birmingham, supra. Cox v. Louisiana, supra; Edwards v. South Carolina, supra).

Moreover, if distribution of literature on the street required the prior permission of the officials named in the statute, this would constitute a form of censorship in conflict with the provisions of both constitutions (Lovell v. Griffin, supra). The construction of a statute is inadmissible which involves an inhibited application. An otherwise constitutional enactment may not be unconstitutionally enforced.

The posted "No Loitering" sign at the entrance to the school does not help the prosecution. Is distributing informational matter loitering? I think not—nor is the word "loitering" by itself, and without more, "enough to inform a citizen of its criminal implications" (People v. Diaz, 4 N. Y. 2d 469, 470). If the posted sign is relied on to bolster the statute, the statute is open to arbitrary enforcement, and fatally defective as vague. "It is the rule that for validity a criminal statute must be informative on its face (People v. Firth, 3 N. Y. 2d 472) and so explicit that all men subject to their penalties may know what acts it is their duty to avoid (United States v. Brewer, 139 U. S. 278, 288;

People v. Vetri, 309 N. Y. 401)" (ibid.). Neither the statute nor sign conforms to this rule.

There is no showing in the case before us that the conduct of either defendant was calculated to distract the students in their classrooms, or threatened to harm them, or was calculated to damage the school facilities in any way. Absent trespass or disorderly conduct, in its normal reading, the finding of guilt by the court below under section 722-b was without legal justification. The intent of the action is to proscribe the presence of intruders and persons without an acceptable purpose in or about a school. It is not intended to stop, on a public street, innocent conduct constitutionally protected.

I, therefore, dissent and vote to dismiss the complaint against both defendants.

CRIMINAL COURT OF THE CITY OF NEW YORK

County of New York, Part III

The People of the State of New York :	
:	Docket No. C11355
vs. :	Affidavit
William Sprowal, :	
Defendant :	

AFFIDAVIT

On Motion For Resentencing

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

Being duly sworn, deponent says:

My name is William Sprowal and I presently reside at 691 F.D.R. Drive (475-1684) in New York City.

I am the defendant in the above case.

I was arrested on May 29, 1964 for distributing leaflets in front of Charles Evans High School in New York City. On September 4, 1964 I was convicted, after trial, of an offense under Section 722-b of the Penal Laws of the State of New York of having loitered about a school building.

On November 10, 1964 I was given a sixty (60) day sentence for this conviction.

Execution of the sentence was suspended on a Certificate of Probable Cause during the various appeals of the conviction.

By a 2 to 1 decision, my conviction was upheld by the Appellate Term of the First Department by an order and opinion entered on January 13, 1966. The Court of Appeals of the State of New York by a 5 to 2 decision affirmed the conviction on an order entered June 9, 1966. An appeal has been filed in the United States Supreme Court on the constitutionality of Section 722-b.

I am presently employed as a union organizer by Local 1199 of the Retail, Wholesale, and Department Store Union and have been employed in such capacities since June of 1965. The home office out of which I am employed is at 709 Eighth Avenue in New York City (JU 2-1890) and my employment requires that I frequently be in the field.

I have two children, William Christie Sprowal, seven years old and Karen Christina Sprowal, six years old. I am divorced and have custody of these two children by virtue of an agreement between myself and my former wife. Both of my children live at home with me and are attending local public schools.

I am the sole support of my two children.

I have no other source of income apart from the salary I am paid by virtue of the above employment. I have no assets nor do I have any appreciable bank account. My entire savings amount to under three hundred dollars ($300.00).

If for any reason I am unable to continue my employment, there will be no income from any source for the support of my two children.

Since my conviction on September 4, 1966 under the offense defined in Section 722-b, I have not been arrested nor convicted anywhere on any charge.

I live at home on a full time basis to take care of my children and to take part, as best I can, in local community affairs.

For example, at the request of Captain Fink, precinct captain of the Ninth Police Department Precinct, I have recently joined the Police Department Community Relations Committee of the Ninth Precinct, the precinct within which I live.

William Sprowal

William Sprowal

Sworn to before me this 13th day of January, 1967.

John Q. McQuillan

Notary Public

JOHN Q. McQUILLAN
Notary Public, State of New York
No. 60-7873790
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1968

Statement

It is submitted that defendant Sprowal's sixty (60) day sentence if executed would serve no useful purpose and would in fact greatly burden society.

The accompanying affidavit of William Sprowal, the defendant, shows that he is presently gainfully employed and has been continuously employed for over a year and a half in the same job. It also shows that he is the sole support and the only possible support, apart from Welfare, of his two children. It further shows that he has established a law abiding and constructive existence not only as a gainfully employed member of society but as a man who is come to a position where he can contribute to the well being of his neighborhood.

Accordingly, it is submitted that it would be in the best interest of this defendant, his children and of society for this Court to reconsider its sentence and to impose a suspended sentence on defendant Sprowal so that there will be no interruption in his presently constructive and useful role as a father who is discharging his responsibilities to bringup his children and as a self-supporting member of society.

Of perhaps less importance than the above consideratation is the fact that the offense which Mr. Sprowal was convicted in no sense involves moral turpitude. Neither deceit nor violence was in any sense involved.

Indeed the offense is one that has raised real legal questions concerning the applicability of the statute to the conduct and the constitutionality of the statute as applied. Surely Mr. Sprowal should not be required to serve a sentence where three eminent judges were of the opinion that his conduct was legal and constitutionally protected.

Further is the fact that three of his co-defendants were

found not guilty after trial of the same conduct taking place across the street. A fourth co-defendant's conviction was reversed on appeal and a new trial ordered. The District Attorney then moved to dismiss the case and such motion was granted.

It would seem unfair after all this to make Mr. Sprowal serve out a jail term.

But, most important of all, is the major consideration that no good purpose will be served in sending this man to jail and only ill will come to himself, his children and society if the present on-going and stable employment situation is disrupted.

Respectfully submitted

by Lloyd McAulay
Lloyd McAulay
Attorney for Defendant

CRIMINAL COURT OF THE CITY OF NEW YORK
County of New York, Part III

The People of the State of New York	Docket No. C11355
vs.	
William Sprowal, Defendant	

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed affidavit of defendant and attorney's statement, the undersigned will move before the Criminal Court, County of New York, Part III therein on the 20th day of January, 1967 at 10:00 in the morning or as soon thereafter as parties can be heard for a reconsideration of the sixty (60) day sentence imposed on the defendant Sprowal and that a suspended sentence be imposed.

dated: this 16th day of January, 1967

Lloyd McAulay

Lloyd McAulay
Attorney for Defendant
165 Broadway, New York, N.Y. 10006
WO 4-7030

TO: HON. FRANK HOGAN
District Attorney of New York County

To be argued by
LLOYD MCAULAY

Court of Appeals

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

WILLIAM SPROWAL and STEVEN GORDON,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS

LLOYD MCAULAY,
Attorney for Defendants-Appellants,
No. 165 Broadway,
New York, N. Y. 10006.
WOrth 4-7030

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Court of Appeals

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

WILLIAM SPROWAL and STEVEN GORDON,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS

Introductory Statement

Appellants were convicted of the offense of disorderly conduct under Sec. 722-b of the Penal Law for distributing constitutionally protected leaflets on the public sidewalk outside Charles Evans Hughes High School on Eighteenth Street in the Borough of Manhattan.

The Appellate Term, First Department by a 2-1 vote upheld the conviction of William Sprowal, reversed the conviction of Steven Gordon, and, as to Gordon, ordered a new trial.

The issues on appeal include whether or not appellants' activity falls within the purview of Sec. 722-b and particularly whether or not appellants were in fact loitering.

A further issue is whether or not Sec. 722-b as applied in this case is unconstitutional under the due process clause of the Fourteenth Amendment as an improper abridgement of freedom of speech.

A separate issue as to appellant Sprowal is whether or not the sentencing Court abused its discretion in sentencing Sprowal to sixty days imprisonment.

The Statute Involved

The statute under which both appellants were convicted reads as follows:

> Sec. 722-b. Loitering in school buildings
>
> Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct.

Statement of Facts

Appellants Sprowal and Gordon together with three others, Marianthe Siderelis, Katherine Abel, and James Lanier, were distributing non-commercial leaflets (People's Exhibits 1 and 2) to the students coming out of Charles Evans Hughes High School in the early afternoon of May 29, 1964. Two leaflets were distributed. One leaflet (People's Exhibit 1) requested students to work with downtown CORE during the summer. The other leaflet (People's Exhibit 2) requested support for Councilman Weiss' bill to establish an independent civilian review board to review charges of improper police activities and also invited the reader to join Downtown CORE.

After reviewing the leaflets, the arresting officer, Patrolman Gruntz, told the defendants that they could not distribute the leaflets on Eighteenth Street, the block where the high school is located (R. pp. 10-12). Three of the defendants, Siderelis, Abel, and Lanier, then went to the south side of Eighteenth Street, directly across from the school, and distributed their leaflets to students coming across the street. Defendant Gordon went up the block on

the north side of Eighteenth Street to a distance perhaps two hundred feet from the end of the school building (R. p. 15). Defendant Sprowal remained in front of the school distributing leaflets to students as they came out of the main school entrance. All five defendants were at all relevant time on the public sidewalks on Eighteenth Street between Eighth and Ninth Avenues.

The school is on the north side of 18th Street, in the middle of the block. There is no yard or fence between the school building and the sidewalk. The sidewalk adjacent to the school is approximately twelve feet wide (R. p. 54).

All five defendants were arrested and charged with the offense of disorderly conduct under Sec. 722(3) of the Penal Law. On June 15, 1964, at the direction of the District Attorney, the charge of disorderly conduct under Sec. 722-b was added (see back page of the complaint).

After trial, all five defendants were found not guilty of the Sec. 722(3) offense; defendants Siderelis, Abel, and Lanier were found not guilty of the Sec. 722-b offense; while defendants-appellants Sprowal and Gordon were found guilty of the Sec. 722-b offense.

On October 19, 1964, Steven Gordon was sentenced to serve five days' imprisonment or pay a $50.00 fine. He paid the fine.

On November 10, 1964, William Sprowal was sentenced to serve 60 days' imprisonment. The sentencing judge was not the trial judge.

Appeal was taken to the Appellate Term, First Department. In an opinion published January 13, 1966, Sprowal's conviction and sentence was upheld and Gordon's conviction was reversed and a new trial was ordered. The majority stated that Gordon's conviction could not be upheld if Gordon was distributing leaflets some 300 feet down the city block from the end of the school building. As far as

this appeal is concerned, the possible confusion as to Gordon's location does not affect the points of law presented.

POINT I

The arresting officer's testimony taken at face value fails to make out a case under the statute.

Regardless of the view taken of the testimony, it is clear that both appellants Sprowal and Gordon were on the public streets distributing CORE literature. That was their sole purpose and activity. How far away Gordon was from the school building line is essentially irrelevant to the legal issues involved herein. A prima facie case has not been made out under the statute because defendants were not loitering. Furthermore, the purposes of the statute can well be served without proscribing the activity for which defendants were convicted.

A. Appellants Were Not Loitering.

It would appear from the following cases that our law makes a distinction between "loitering" and "legitimate purpose". The distinction is such that one who is present or tarries and has a legitimate purpose can not be loitering. At least as far as criminal statutes are concerned, the term "loitering" means to tarry or linger with an illicit purpose and perhaps also means to tarry with no discernible purpose. But, surely the term "loiter" in a criminal statute does not mean to tarry with a legitimate purpose.

Furthermore, if the statute is not to fall for vagueness, the term loiter must have a meaning that is relatively specific and ascertainable. The term loiter must be directed to activities which have a reasonable relationship to the evils sought to be proscribed. The term loiter must not apply to legitimate activity and certainly not to constitutionally protected activity.

In the Case of *People* v. *Diaz,* 4 NY 2d 469, 176 NYS 2d 313 (1959), the Court of Appeals held as unconstitutionally void for vagueness a local ordinance which read: "No person shall lounge or loiter about any street or street corner in the City of Dunkirk." The Court felt that, in this context, the term loiter failed to point up the proscribed act, either real or threatened. The Court pointed out that the ordinance made no distinction between conduct that was calculated to harm and that which was essentially innocent. The Court contrasted this invalidated ordinance with Section 722 where there is a requirement that there be an intent to breach the peace or at least activity whereby a breach of the peace may be occasioned. Given the fact that Section 722-b, like the invalid Dunkirk ordinance, does not require a breach of the peace as an element of the offense, the term loiter becomes of major importance in delineating the acts which are proscribed.

Accordingly, in *People* v. *Dennis,* 208 NYS 2d 522 (City Court of New Rochelle, 1960) a New York Court stated ". . . Section 722-b was not intended to, nor does it, apply to persons entering upon school property with a legitimate purpose, . . . only when such conduct as citizens overtly affects the proper and normal conduct of the school would we believe that the Legislature would have a constitutional right to impose a limitation on such conduct." Thus the New Rochelle Court found that the scope of Section 722-b did not cover Negro parents who brought their children to a school other than the one for which they were districted.

Similarly, in *People* v. *Parker,* 138 NYS 2d 2 (City Magistrates Court of NYC 1955), a court which stated "It is common knowledge that public school property is not free to everyone like a public street or park", then went on to state: "The statute does not prevent anyone from going on the premises to transact legitimate business." How much more so, then, are appellants' activities, which did not take place on school premises but rather on a public street, legitimate activities.

The Dennis and Parker cases, one by a holding and the other by dicta, point out that there are legitimate activities which may take place on school property which would have to be deemed outside the proscriptive scope of Section 722-b even though they do not fall within the exceptions specified in Section 722-b. When the activity involved is not on school property, then surely the scope of legitimate activities is even broader than those activities indicated as legitimate in the Dennis and Parker cases.

All of the reported cases which have arisen under Section 722-b involved defendants present on school property. Thus the convictions which have been upheld and the constitutional challenges to the statute which have been rejected are in a context substantially different than that posed by appellants. The key distinction is that appellants were not on school property.

Thus in *People* v. *Johnson,* 6 NY 2d 549, 190 NYS 2d 694 (1959), the Court of Appeals made quite clear that it was not dealing with activity that takes place outside school property when it upheld the conviction of the defendant and the constitutionality of the statute against attack on the grounds of indefiniteness. The Court was explicit in pointing out (6 NY 2d at p. 552) that a school building was of a restricted public nature and thus the statute could not be considered as vague and indefinite to the extent that it applied to a school building. After all, presence in a school building may be considered in the nature of a trespass and thus bring to the term "loiter" the illicit context necessary in a penal statute. Where there is no trespass the illicit context must be found in the nature and purpose of defendants' activities.

B. Appellants' Activity Is Irrelevant to the Purpose for Which the Statute Was Passed.

It is important to recognize the purpose for which Section 722-b was enacted since knowledge of such pur-

pose throws light on what is a legitimate interpretation of the scope of Section 722-b and also assists in determining the constitutional legitimacy of any claim that appellants' activities may properly be proscribed.

Section 722-b was introduced as a bill at the request of the Board of Education of the City of New York. In a March 24, 1954 letter to Governor Dewey, the President of the New York City Board of Education, Andrew G. Clauson, Jr., stated:

> . . . This bill was introduced at the request of the Board of Education . . .
>
> It is a matter of common knowledge that many persons enter public school buildings for the purpose of committing vandalism or for other unlawful purposes. Children from time to time have been subjected to sex attacks, robbery, assault and other unlawful acts by these intruders.
>
> . . . It would greatly strengthen the hands of the school authorities if the above described bill were enacted into law since it would make the unexplained presence of an intruder a punishable offense.
>
> . . . Only persons illegally on school property may be found guilty under the provisions of this bill.

It might be noted that Mr. Clauson directed his comments to intrusion on school property.

In a March 31, 1954 memorandum to the Governor prepared by Charles A. Brind, Jr., counsel to the State Education Department, Mr. Brind stated:

> We understand that this measure has been sought by New York City in order to strengthen the police authority over persons who become troublesome by loitering on school property.
>
> We think that the bill is unnecessary because boards of education would have complete jurisdic-

> tion over school grounds and buildings and persons who enter upon such property without the consent of the board of education are trespassing in exactly the same manner as a person would be who attempts to enter upon private property. Neither school buildings nor school grounds are public buildings or grounds.
>
> However, in the light of the fact that the authorities of New York City feel that this measure would strengthen their position in the matter, we see no objection to it.

The New York State School Boards Association, Inc., sent a letter to Governor Dewey on March 31, 1954, indicating that they had no objection to the bill that ultimately became Section 722-b. Mr. Everett R. Dyer, Executive Secretary for the Association, wrote:

> This bill is sponsored by the New York City board of education. School authorities in the city have been having serious difficulties with groups of your people coming into the schools, frightening teachers and pupils alike and creating a disturbance.
>
> Recently there have been several incidents involving gangs of young people visiting schools adjacent to New York City making a disturbance and interfering with the operation of these schools.
>
> We understand that the definition of loitering has been established by the court to mean those who have no legitimate business in the school.
>
> We believe the intent of this bill is clear. It is designed to sharpen the penalty for those who, by making nuisances of themselves in or about a public school, cause trouble for school authorities.

Thus it would seem manifestly clear that the problems to which Section 722-b is addressed have nothing to do with the activities for which appellants were convicted under Section 722-b. The above letters would indicate that the concern of the educational authorities who requested and approved the bill was to have a means for dealing with those who are improperly in a school building or on school property.

As an additional factor, it might be noted that there is no indication in any of these letters that the school authorities were concerned about individuals who were loitering or otherwise present on the public streets or sidewalks near school property. Thus there is every reason to believe that the intention of the educational authorities who supported and requested introduction of the legislation was such that the phrase "who loiters in or about any school building or grounds" refers solely to school property and does not include public sidewalks that run by a school.

More importantly, it is clear from the above letters that the problem to which the legislation is addressed is that of vandalism of school property and assaults against teachers and students. It is apparently assumed by at least one writer (Mr. Everett R. Dyer) that the term "loiter" would be applied only to those who have no legitimate purpose. Considering our country's tradition of pamphleteering and public discussion of public issues and the constitutional protections which have been explicitly created around that tradition, it would appear most strained to construe legislative intent in the use of the term "loiter" as including those whose purpose it is to distribute literature directed to public issues.

It is apparent that at least one responsible endorser of the bill (Mr. Dyer) believed that the courts would take a more restricted view of the term "loiter" than was taken by the courts below. There is no reason for believing that

any sponsor or endorser of the bill conceived that it would be applied to activities such as those engaged in by appellants.

The opinion of the majority of the Appellate Term leaves the impression that appellants' position, if upheld, would bar the police from standing between our school children and hoards of addicts, perverts and thugs. It must be emphasized that the legal issue presented by appellants is not that of choosing between preventing defendants from distributing literature and being unable to prevent injury to school children. Those activities which are likely to cause injury to school children or disturb classroom decorum can be covered by this statute appropriately construed without having to apply the statute to those, such as appellants, who have a clear-cut and legitimate purpose behind their activities.

In the case of *People* v. *Bell,* 306 NY 110, 115 NE 2d 821 (1954), the Court upheld a reversal of a conviction under Section 1990a(2) of the Penal Law relating to loitering around railroad property. Four men were arrested for loitering around a radiator in a railroad station. The Court in holding the People had failed to make out a *prima facie* case under the statute, stated:

> Acts of the Legislature which are directed against known and stated evils are not to be stretched to cover situations having no real or reasonable relation to those evils, . . . (306 NY at p. 114).

C. The Comparable Statute in the New Penal Law Confirms the Above Points Concerning Legislative Intent and Proper Construction of the Statute.

Section 240.35(5) in the new Penal Law which goes into effect on September 1, 1967 corresponds to the present Section 722(b). Section 240.35 entitled "Loitering" states:

> A person is guilty of loitering when he: . . .
>
> 5. loiters or remains in or about a school building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil or any other specific, legitimate reason for being there, and not having written permission from the principal; . . .

It would appear only appropriate to interpret Section 722(b) in light of the careful consideration given to the problem by the State Commission on Revision of the Penal Law in writing the statute as well as in light of the presumed legislative intent in passing the statute. It is only sound statutory construction to presume that a statute of this sort does not apply to people having "any other specific, legitimate reason" for being present in the area where loitering is otherwise prohibited. It is sound draftsmanship to include such an exception explicitly in the statute so as to avoid the difficulty faced in the instant case.

POINT II

Section 722-b, if construed to be applicable to this set of facts, is unconstitutional because it imposes a ban on the distribution of constitutionally protected literature on a public street.

In connection with this point, one can well concede that our most cherished personal freedoms may be limited under appropriate circumstances. However, these appropriate circumstances require that there be a compelling interest and that the restraint or limitation be drawn with narrow specificity so as to impose no greater a restraint on these freedoms than is absolutely necessary to meet the compelling interest. A brief review of the purposes of the legislation and of the cases wherein the statute has been applied will

show that there is no such justification for imposing the restraint that was imposed on appellants and their activities in distributing leaflets on the public sidewalks in front of Charles Evans Hughes High School.

In the last few decades, the United States Supreme Court has, with increasing frequency, strongly urged the primary importance of the rights of speech and press that are of concern in the instant appeal. However, it might put the problem faced in this appeal in better perspective if the following very brief opinion by one of the United States Supreme Court's more cautious advocates of judicial intervention be considered as setting the very minimum standards which a statute must meet where that statute impinges on rights of speech or press. In the case of *Talley* v. *California*, 362 U. S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 536 (1960) the United States Supreme Court held as unconstitutional a Los Angeles municipal ordinance which required that the name of the sponsor of all hand bills appear on the face thereof. Mr. Justice Harlan, concurring in the judgment of the Court, wrote (and the following is his entire opinion):

> In judging the validity of municipal action affecting rights of speech or association protected against invasion by the Fourteenth Amendment, I do not believe that we can escape, as Mr. Justice Roberts said in Schneider v. State, 308 U. S. 147, 161, "the delicate and difficult task" of weighing "the circumstances" and appraising "the substantiality of the reasons advanced in support of the regulation of the free enjoyment of" speech. More recently we have said that state action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling. See N. A. A. C. P. v. Alabama, 357 U. S. 449, 463, 464; Sweezy v. New Hampshire, 354 U. S. 234, 265 (concurring opinion); see also Bates v. Little Rock, — U. S. —.

> Here the State says that this ordinance is aimed at the prevention of "fraud, deceit, false advertising, negligent use of words, obscenity, and libel," in that it will aid in the detection of those responsible for spreading material of that character. But the ordinance is not so limited, and I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, such a generality is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this all-embracing ordinance is likely to have.
>
> On these grounds I concur in the judgment of the Court.

It is of major importance to recognize that the guidelines stated by Mr. Justice Roberts in the *Schneider* v. *State* case (cited and quoted by Mr. Justice Harlan above), is that what is being weighed is on the one hand the freedom of speech and on the other hand "the *substantiality* of the reasons advanced in support of the regulation of the free enjoyment of speech". Thus it is not simply the evil to which the restraint or regulation is addressed that is weighed against the benefits of free speech but rather the *substantiality* of the reasons for the particular regulation that is weighed against the benefits of free speech. With application to Section 722-b, it is thus not the need to mitigate the various evils (disruption of the school, gang fights in the school premises, the sale of narcotics and pornographic literature to school children) to which Section 722-b is addressed that must be weighed against the right of free speech. Rather it is the necessity for applying this kind

of restraint to those distributing constitutionally protected literature that must be weighed against the fact of the restraint on the distribution of consitutionally protected literature.

Clearly, a statute can be written, or the present statute can be interpreted, so that those who loiter on or about school premises with no legitimate purpose in mind can be apprehended or required to move on without having such limitations directed to those who are engaged in what otherwise would be constitutionally protected activities. Thus to deem the statute unconstitutional as applied to defendants-appellants is by no means to say that a regulation cannot be written or construed so as to deal with the real evils to which this statute is directed. With appellants' position as to the constitutional problem involved herein clearly in mind, it may readily be seen that there is absolutely no substantial reason that can be advanced to support the restraint on appellants' freedom to distribute noncommercial and constitutionally protected literature on the public sidewalks in front of and about a school building.

From a reading of the opinions in the trial and appeals courts below, one may be led to believe that the key constitutional issue is in the balancing of free speech against the need to protect our children from molestation. But, this is not the key constitutional issue. If it were, then a very difficult balancing task would be involved since we must recognize that, as stated by Judge HOFSTADTER in his dissent, "regulation of conduct must not be so broadly framed as to stifle freedom of speech". However, the key constitutional issue presented in this case is in the balancing of the value of free speech against the necessity for this particular restraint on free speech. Since no good purpose at all is served in restraining the distribution of literature on the public ways in front of a school, the balancing problem referred to by Justice Harlan in the *Talley* case (and

by Justice Roberts in the *Schneider* case) becomes one where a vastly important right is weighed against a negligible reason for the regulation of that right. Certainly, Section 722-b, if it be construed to apply to appellants, is even more clearly unconstitutional than were the various statutes struck down by the United States Supreme Court in *Schneider* v. *State*, 308 U. S. 147 (1939) 60 Sup. Ct. 146, 84 L. Ed. 155 where the Court stated:

> We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. (308 U. S. at p. 162)

A. The Free Speech Constitutional Defect in Appellants' Conviction Is Exacerbated by the Fact That Appellants Were on a Public Sidewalk When Distributing Their Literature.

The undisputed testimony in the case is that appellants at all times were on public sidewalks in front of or near the Charles Evans Hughes High School when distributing their literature and that it was their activities in distributing this literature on the sidewalks for which they were arrested.

As Justice Roberts said in *Hague* v. *CIO*, 307 U. S. 496, 59 Sup. Ct. 954, 83 L. Ed. 423 (1939):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. (307 U. S. at p. 515)

And Justice Roberts, again later that same year, in the case of *Schneider* v. *State,* 308 U. S. 147, 163 (1939) stated:

> The streets are the natural and proper place for the dissemination of information and opinion.

If by bits and pieces we can cut out exception from our rights to use the streets and parks for this kind of activity, we will end up by seriously inhibiting such use since the citizen can not possibly keep all exceptions in mind and will fear to exercise his rights for fear of falling within some unknown exception.

Appellants' case does not raise the harder questions of the extent to which areas other than the public ways must be opened to those who communicate to their fellow citizens on public issues. Apellants' case deals with the most rudimentary type of situation; one in which a portion of the public sidewalks has been denied to them as a place for the peaceful distribution of literature concerning non-commercial matters of public interest.

B. The Limitation Imposed on Appellants Is Particularly Egregious as the Literature Being Distributed Was Directed to Students at the Only Reasonable Public Place Where These Students Could Be Reached.

It is clear that appellants had the intention and purpose of putting this literature into the hands of students. It can well be imagined that if defendants followed the instructions of the arresting officer and distributed literature only on Eighth and Ninth Avenues, that they would fail entirely in their purpose of reaching a sizeable number of students in the high school. Accordingly, Section 722-b, if upheld as appropriately applied to apellants, would bar appellants from effective contact with their intended audience.

It would seem that the importance and the weight given to appellants' right to communicate with other citizens on

public matters is enhanced where there is no effective alternative mode for carrying out the intended constitutionally protected activity. The specific activity being, in this case, to get literature into the hands of students at the high school. Again, to quote from Justice Roberts in *Schneider* v. *State,* 308 U. S. 147, 163 (1939):

> One is not to have the exercise of his liberty of expression abridged on the plea that it may be exercised in some other place.

C. The Restraint Imposed on Defendants Is Most Onerous Where It Acts to Effectively Bar School Children from Expressions of Constitutionally Protected Ideas.

The restraint imposed on appellants suffers the special debility of a restraint on academic freedom. It is one thing to protect students from physical harm. It is quite another thing, and a most ironic thing, to keep viewpoints and ideas from them. As Justice Frankfurter said in *Wieman* v. *Updegraff* (a case involving the academic freedom of teachers), 344 U. S. 183, 73 Sup. Ct. 215, 97 L. Ed. 216:

> . . . Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. (344 U. S. at p. 196)

POINT III

To the extent that Section 722-b applies to constitutionally protected conduct, the requirement of prior approval by a state official (the school principal or custodian) renders Section 722-b void on its face as an unconstitutional prior restraint on free speech and publication.

There is probably no more onerous restraint on our first amendment freedoms than that of prior censorship. In a long line of cases, the United States Supreme Court has time and again held restraints on rights that arise out of the First Amendment to be void on their face where any measure of discretion is given to a state official as to who may or may not exercise these rights. Thus a licensing ordinance which forbade distribution of literature without a license was deemed void on its face in *Lovell* v. *Griffin*, 303 U. S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949 (1937).

As recently as January, 1965, the United States Supreme Court reversed a conviction under a Baton Rouge ordinance that prohibited all street assemblies and parades. There was evidence that local officials permitted certain exceptions and thus the *de facto* discretion lodged in police officials made the conviction an unconstitutional restraint. As the Court stated in *Cox* v. *Louisiana*, 379 U. S. 536, at p. 557, 33 Law Week 4099, 4105 (Jan. 18, 1966):

> The situation is thus the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion of the local officials. The pervasive restraint on freedom of discussion by the practice of the authorities under the statute is not any less effective that (sic) a statute expressly permitting such selective enforcement.

* * *

> This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. See *Saia* v. *New York, supra,* at 562. Also inherent in such a system allowing parades or meetings only with the prior permission of an official is the obvious danger to the right of a person or group not to be denied equal protection of the laws.

Accordingly, if Section 722-b is deemed by New York law to have any relevance at all to appellants' conduct, the statute is fatally defective on its face in permitting the person in charge of the school to grant written permission waiving the proscription.

POINT IV

Section 722-b, insofar as it applies to conduct that is not actually on school property, is void for vagueness.

As has been pointed out in the discussion under Point I above, the New York Courts have been concerned with the indefiniteness challenge to the statute but have always been able to save the statute since the case at hand concerned conduct on school grounds. See, for example, *People* v. *Johnson,* 6 N. Y. 2d 549, 190 N. Y. S. 2d 694 (1959) discussed on page 6, *supra.*

When Section 722-b is applied to activities on the public sidewalks, a host of problems relating to its vagueness and indefiniteness arise.

Thus the term loiter has come to have a meaning which does not include the kind of legitimate and purposeful

activities in which appellants engaged. If the term loiter is intended to cover them, that term and the statute become so indefinite as to render prosecution under it a violation of due process. See *People* v. *Bell* (p. 10, *supra*).

Furthermore, the statutory proscription as to loitering about school property is extremely vague as to how far away "about" is. In the case below, three defendants who distributed literature across the street were found not-guilty, while appellant Gordon, down the block, was found guilty. The Court in *Bailey* v. *Dennis, supra,* stated:

> . . . It is clear that Section 722-b has no application to loiterers in the vicinity of the school. (208 N. Y. S. 2d 522, 533)

As a third consideration it should be recognized that it is a strange thing to label as disorderly conduct activities such as those for which appellants were convicted. The phrase disorderly conduct has come to have a real meaning in New York law. In *People* v. *Most,* 171 N. Y. 423 and *People* v. *Perry,* 265 N. Y. 362 (1934) the Court of Appeals has pointed out that disorderly conduct relates to actions that either disturb the public peace or tend to such disturbance. Section 722-b has no such requirement and it is a strange thing for the Penal Code to label activity as disorderly conduct where this breach of the peace element is missing. It is improper to require appellants to carry the burden of a disorderly conduct conviction where no breach of the peace is involved or likely to be occasioned.

Recently, the Supreme Court has reminded us that the criminal law is not to be loosely applied. In *United States* v. *Boston and Maine Railroad,* 380 U. S. 157 (at p. 160), 33 Law Week 4256, 4257 (March 8, 1965) the Court stated:

> A criminal statute is to be construed strictly, not loosely. Such are the teachings of our cases from

United States v. *Wiltbeger,* 5 Wheat. 76, down to this day. Chief Justice Marshall said in that case:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. Id., 95.

POINT V

The sentencing Court abused its discretion in imposing a sixty day sentence on appellant Sprowal.

Considering the unprecedented application of the statute to the distribution of literature on a public street, the fact that appellant Sprowal had never been arrested or charged before under Section 722-b and the fact that the offense does not involve a breach of the peace element, there is no possible justification for imposing the sentence that was imposed on appellant Sprowal.

There is certainly no element of moral turpitude in the offense nor in the actions of appellant Sprowal. The fact that Sprowal has a previous record involving entirely different types of matters can have no bearing whatsoever on what is an appropriate sentence to discourage the activity sought to be proscribed under this statute.

Furthermore, appellant Sprowal's attorney has attempted to obtain Sprowal's fingerprint record without success so that his ability to present a comprehensive argument concerning this point has been, it is respectfully submitted, limited in such a fashion as to deny to appellant Sprowal full due process of law.

Conclusion

For the various reasons stated above, the judgment and sentences below should be reversed with directions to remit appellant Gordon's fine. In any case, appellant Sprowal's sentence should be reduced to one comparable to that pronounced on appellant Gordon.

Respectfully submitted,

LLOYD MCAULAY,
Attorney for Appellants,
165 Broadway,
New York, N. Y. 10006,
WOrth 4-7030.

January 18, 1965

Lloyd McAulay, Esq.
Kenyon & Kenyon
165 Broadway
New York, New York

Dear Lloyd:

I enclose a copy of the court order in People v. Sprowal & Gordon1 Sprowal as you can see was affirmed. I must confess to being shocked by the decision, but in a sense it will give us a chance to go to the New York Court of Appeals, which should have the case anyway. Are you interested in working on the casw on that lwvel? I would appreciate you letting me know as soon as you can so we cmh make our application if we have to, to appeal. This case deserves to win, and I wish to carry it higher.

Let me hear from you soon. With best regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/cs
Enc.

LAW OFFICES OF
KENYON & KENYON
165 BROADWAY
NEW YORK, N.Y. 10006

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FREDERICK BACHMAN
OF COUNSEL

GEORGE T. BEAN (1937-1959)
DOUGLAS H. KENYON (1924-1964)

FEB 2 6 1965

February 25, 1965

Steve Pres took copy of this and will try to do something-

Carl Rachlin, Esq.
CORE
38 Park Row
New York, N. Y.

Re: Sprowal

Dear Carl,

With regard to the Sprowal case, I will have to enter into a stipulation with the D.A. next week as to when the record and briefs are to be filed. In order to do this meaningfully, I've got to have some idea as to when the records will be paid for so that I will know when I will have them in hand. Please give me a date so that I can add on to that enough time to prepare the brief.

In connection with the appeal, I would like to have someone look into a couple of matters for me. Specifically:

1. Cases relevant to the point that the sentencing judge abused his discretion in giving Chris Sprowal sixty days.

2. I would like to have someone look up the NLRB cases that delineate where and when unions are allowed to pass out literature on company-owned property. The theory of these cases is that effective access to the employees should not be

denied the union since that would be equivalent to denying them an effective right to organize. I doubt that I would want to include such cases in the brief but I think it might be worthwhile having them in mind as useful analogies. Certain of the "balancing" considerations are similar to those involving the constitutionality of restrictions such as 722b.

I've got all I need on the First Amendment issues and I doubt that anyone's research could provide anything useful in addition to what I have. I would appreciate either a reference or a copy of the California decision that you mentioned to me last weekend.

Very truly yours,

Lloyd McAulay

Lloyd McAulay

If you have someone willing to look into either of the above two matters, please have him call me.

a national organization with affiliated local groups working

CONGRESS OF RACIAL EQUALITY

CORE

to abolish racial discrimination by direct, nonviolent methods

38 PARK ROW
NEW YORK 38, NEW YORK
COrtlandt 7-6270

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Carl Rachlin, Esq.
general counsel

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APR 19 1965

213½ West Main Street
Durham, North Carolina

April 15, 1965

Carl Rachlin, Esquire
Congress of Racial Equality
38 Park Row
New York 38, New York

Re: CHRIS SPROWL

Dear Carl:

We had attempted to reach you by phone but without success. On last evening around 10 p.m. Chris Sprowl called to relate that he was taken to court on Monday at whihh time he was advised that an appeal on his behalf had not been prefected and that the time had run out on same. His bond was canceled and he was placed in jail where he stayed until April 14, 1965. You will recall that he discussed the matter of his being notified to appear in court on Monday with us at the NAC Meeting. His wife was able to get him out on a $500.00 posted appeal bond which premium for said bond was paid for by CORE. He advises that he was arrested sometime in April 1964 near 18th Street and 8th Avenue for distributing leaflets. He aas charged and tried on a charge of disorderly conduct on November 10, 1964 and received a 60 day jail sentence which was appealed. Shortly after talking with Chris we received four additional calls from the New York area complaining of me, you and CORE for our failure to adequately and competently represent Chris.

Chris advises that he had an attorney whose first name was Lloyd and that said attorney did not adequately represent him, or did not represent him to his satisfaction.

May I urge that you investigate this matter at your very earliest convenience and I would appreciate being kept posted on this case. Situations like this can do much to harm our image and I know that you will do all you possibly can to protect that image. If I can be of assistance in any way please feel free to call upon me.

With very kind regards, I am

Yours very truly,

F. B. McKissick

FBMcK:sal
CC: Chris Sprowl

April 20, 1965

Hon. John M. Murtagh, Chief Administrator
Criminal Court of the City of New York
100 Centre Street
New York, New York

In re: William Sprowal and Steven Gordon
Docket Nos. C11353-11356

Dear Judge Murtagh:

Mr. Lloyd McAuley has just been in to see me and advised me of your kindness to him with reference to the above matter. He raised an additional point, however, that I feal should be brought to your personal attention.

Earlier today, Mr. McAuley asked Mr. Sparer who, I believe, is the administrative clerk of the court, for access to Mr. Sprowal's fingerprint record. Mr. Sparer advised Mr. McAuley that he was not permitted to give Mr. McAuley such information.

Since one of the main points in the appeal concerns the sentence given to Mr. Sprowal, it would appear most important, if Mr. McAuley is to perform his constitutional duty towards the appellants, particularly Mr. Sprowal in this instance, he must have the information contained not only in the fingerprint record but also in the probation record. One of the grounds of the appeal concerns what we urge is the unusually harsh sentence given to Mr. Sprowal. Without the information in the fingerprint record and the probation record, Mr. McAuley cannot properly argue this point.

May I, therefore, respectfully request that the information sought herein be made available to Mr. Lloyd McAuley, Room 1925, 165 Broadway.

Very truly yours,

Carl Rachlin
General Counsel

CR/js

cc: Lloyd McAuley, Esq.

JOHN M. MURTAGH
ADMINISTRATIVE JUDGE

CRIMINAL COURT OF THE CITY OF NEW YORK
100 CENTRE STREET
NEW YORK 13, N. Y.

APR 2 2 1965

April 21, 1965

Carl Rachlin, Esq.
38 Park Row
New York, N.Y. 10038

Dear Mr. Rachlin:

This will acknowledge receipt of your letter of April 20, 1965.

I sincerely regret that I cannot be of help in this matter. Probation reports are confidential and are, therefore,not available as requested.

Sincerely yours,

John M. Murtagh

Administrative Judge

JMM: jes

April 22, 1965

Lloyd McAuley, Esq.
Kenyon & Kenyon
165 Broadway, Room 1925
New York, New York

In re: Sprowal

Dear Lloyd:

Enclosed is a photocopy of Judge Murtagh's letter in Chris Sprowal's case. We should consider whether we ought to bring a motion in Appelate Term seeking an order for the inspection of the police and probation records.

Regards.

Sincerely,

Carl Rachlin
General Counsel

CR:JG

enclosure

cc: George Schiffer, Esq.

Sprowal file

JUL 6 1965

RFB/

230 West 105 Street
New York, N. Y. 10025
July 4, 1965

Carl Rachlin, Esq.
38 Park Row
New York, N. Y.

Dear Carl,

I am leaving for Mexico for two weeks. It occurs to me that you had best be alerted in case anything happens in the Sprowal case. I hope someone is checking the NYLJ for App. Term's opinion. If something does happen and you need access to my files on this case, call Charles Brainerd at my office (WO 4-7030). He knows where my files are. My secretary, Susan Barlow, can also probably find them. They are in two red manilla envelopes at the front of the third file drawer down in my personal file cabinet. I'll be back by July 20th.

Lloyd McAulay

Lloyd McAulay

Sprowal 2

ONE SIXTY-FIVE BROADWAY
NEW YORK 6, N.Y.

March 3, 1966

MAR 4 1966

Carl Rachlin, Esq.
38 Park Row
New York, N. Y.

Dear Carl,

This is just to remind you that in connection with the Sprowal case, as well as the earlier cases involving Bob Gore and a number of other people who were sentenced to 30 and 60 days, it might be worthwhile having some of the law student volunteers look into the question of what procedures are available for getting a sentence reduced. My major thought here is that a long period of time has elapsed between the date of the sentence and the resolution of the appeal (assuming the resolution of the appeal will be unsatisfactory) and it does not serve any purpose to execute on the sentence. The purpose of sentence is rehabilitation and is made at a given time in the context of a specific probation report. It would seem that after all this time a new probation report is called for and sentence should be reconsidered.

Another thought, concerning sentencing, that ought to be explored relates to the new Penal Law which comes into effect in September of 1967. It imposes, in general, lesser maximum sentences for loitering and disorderly conduct violations. Thus the new Penal Law §240.35(5) which is the newer version of §722-b is deemed a violation which carries a 15 day maximum sentence, see §70.15(4). Similarly, disorderly conduct, §240.20 is a violation. It might then be possible to argue that in the light of change of a legislative intent, it makes no sense to carry out sentences of a longer duration than the maximum sentence the legislature has now deemed to be appropriate for the particular violation.

I would also suggest that the law students look into the procedures relating to a Governor's pardon. I realize that these pardons have rarely, if ever, been applied to offenses. But, if there is any basis for requesting such (assuming that there is no reasonably effective way of going at this through the courts), then I think we might try to get to Rockefeller through Lindsay. Perhaps I over-estimate what can be done but I do think that, through Don Elliot, we can persuade Lindsay to make a favorable recommendation to the Governor. From a straight political point of view, the various defendants have the kind of organizational connections which Lindsay probably would not mind accommodating. Sprowal's connection with Local 1199 is one example.

Besides, how would it look for New York City to put Mickey Schwerner's wife in jail for 30 days?

Lloyd McAulay

Lloyd McAulay

October 21, 1966

Harry Weinstock, Esq.
Sipser, Weinstick & Weinmann
50 Broad Street
New York, New York

Dear Mr. Weinstock:

Attached please find the opinion of the Appellate Term in People v. Sprowal.

The appearance on October 18, in Part 3 resulted in an adjournment to January 25th, 1967.

Thank you for your interest.

Very truly yours,

Stephen M. Nagler
Associate General
Counsel

SMN:ns
Enclosure

December 1, 1966

Hon. John Davis
Clerk
United States Supreme Court
Washington, D.C.

Re: People of the State of New York
v.
William Sprowal

Dear Mr. Davis:

Under separate cover, Record Press in New York City is sending to you this day forty copies of the Jurisdictional Statement and Appendix in the above-entitled case.

This is to advise you that I appear as counsel for the above-named appellant, William Sprowal, and enclose herewith a check in the sum of $100.00 to your order as the necessary fee for filing the said Jurisdictional Statement. I also enclose herewith the Notice of Appeal in the abovesentitled case and the Record certified by the Clerk of the Court of Appeals of the State of New York.

The Notice of Appeal is dated October 3, 1966 and was filed with the Clerk of the Criminal Court of the City of New York (the Court possessed of the Record). It is therefore our understanding that the sixty-day period expires on Saturday, December 3rd. May we respectfully request, however, that if for any reason because of the increase in mail at this time of t he year because of Christmas mailings, all necessary papers are not filed by Saturday, December 3rd, that this letter be considered as an application for an extension of time to file for two or three days to make certain that we are not in default. If there is any problem about this at all, please call me collect. My associate, Stephen Nagler, is available to make any decision, in case I am not present in the office at the time you call.

Thank you for your many courtesies.

Sincerely yours,

Carl Rachlin
General Counsel

CR:ns
Enclosures

SN
Mrs.

December 2, 1966

Alan Levine, Esq.
N.Y. Civil Liberties Union
156 Fifth Avenue
New York, New York

Dear Alan:

Enclosed please find the Jurisdictional Statement in **People** v. Sprowal. I think it is one of the best of its kind to come down the pike in a long time. I know. I wrote it.

Sincerely,

Stephen M. Nagler
Associate General Counsel

SMN:ns
Enclosure

Legal Defense Fund
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
10 Columbus Circle, New York, N.Y. 10019 • JUdson 6-8397

January 30, 1967

Stephen M. Nagler, Esq.
Scholarship, Education and Defense
Fund for Racial Equality, Inc.
150 Nassau Street
New York, New York

Dear Steve:

I have read the jurisdictional statement in Sprowal and skimmed the record. You have a difficult road on the merits, but I certainly agree that the case is worthy of submission on federal habeas.

In order to assist you I enclose a copy of a petition which we filed recently in Arkansas. Let me call your attention to paragraph 12 of the petition. You will, of course, have to deal with the question of custody in securing federal habeas. Our approach has been to allege as many factors as possible suggesting custody without at the same time surrendering the petitioner and hoping that if the issue is raised we will be successful in arguing that sufficient custody exists for habeas purposes under cases such as Jones v. Cunningham.

In this regard let me call your attention to the prayer for a stay until the habeas petition is disposed of in the federal court. Because of the obvious mootness which would result if such a stay is not granted, you should not have great difficulty in obtaining one, but you should make an attempt to obtain an order to this effect from the federal judge at the time of presenting him with the petition. I am prepared to furnish you with similar motions should you need a stay pending appeal, etc.

Note the alternative prayer for injunctive relief. This is unusual and I have no authority for it. For this reason I do not suggest you use it in the Second Circuit.

A matter which troubles me concerning a petition for habeas in this case is the fact that apparently the judgment of the New York courts was affirmed rather than to Winters v. Beck, where the Supreme Court denied

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petition for writ of certiorari. It might be argued that the disposition on appeal, if I am correct in assuming that the judgment below was affirmed, is res judicata as to all of the constitutional objections which you have raised. Because summary affirmance by the Supreme Court has been subjected to a variety of interpretations, I would not, however, allow this to stand in your way.

A matter you should direct yourself to is whether you desire an evidentiary hearing in the federal habeas forum and if so the sort of evidence you would present to the court. My superficial reading of the record did not suggest any <u>obvious</u> omissions unless you have proof of differential application of the ordinance.

On the merits you might add a <u>Thompson v. Louisville</u> no evidence argument if for no other reason than that it sets up rather nicely the vagueness claim against the word loitering.

Sincerely yours,

Michael Meltsner

MM/mgf
Encs.

Legislative History of S7226 re People v Dennis 208 NYS2d 522; 6 NY 2d 960

S7226 was enacted almost exclusively at request of educational officials of NYC. Assembly man Frank S. McMullen, introducer of Bill in Report of McMullen Committee stated:

We understand that this measure has been sought by NYC in order to strengthen the Police Authority over persons who become troublesome by being on school property.

We think the Bill is unnecessary because the Board of Education would have complete jurisdiction over school grounds and persons who enter upon such property and without the consent of the Board of Education are trespassing in exactly the same manner as a person would be who attempts to enter upon private property.

However, in the light of the fact that authorities of NYC feel that this measure would strengthen their position in this matter, we see no objection to it."

In People v Johnson 6 NY 2d 549, 190 NYS 2d 694 - Counsel for defendant in brief letter from Assemblyman McMullen dated May 19, 1958

"The intention was to find some method of dealing with those persons in and around school property who were there with no legitimate business. The reason that the Board of Education asked for legislation was to obviate the necessity of catching these persons in the act of, for example, peddling dope. Before Police Officers could be called to the premises the evidence would be destroyed. It also appeared that it was difficult to get students to testify. It had come to the schools in NYC, it was reported that men would loiter near the exits with the intent of picking up a youngster for some illegitimate purpose.

Statutes Concerning Loitering in a School Area

1

...N.Y. Penal Code enacted February 1, 19...

Any person not the parent or legal guardian of a pupil in ... at said school who loiters in or about any public ... grounds without written permission from the principal, ... person in charge thereof, or in violation of posted rules ... governing the use shall be guilty of disorderly conduct.

Cases: Bailey v. Dennis 208 NYS2d 522 (1964)
People v. Parker 208 Misc. 978 130 NYS2d (1955)

§240.35 LOITERING Revised Penal Law Effective February 1, 1967
A person is guilty of loitering when he:

5. Loiters or remains in or about a school building or grounds ... any reason or relationship involving custody of or responsibility for a pupil or any other specific, legitimate reason for being there, and ... permission from the principal; or

6. Loiters, remains or wanders in or about a place without ... and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct or purpose.

In The Proposed New York Penal Law drafted and Recommended by the ... State Commission on Revision of the Penal Law and Criminal Code (1964) the Commission staff notes at P. 390 §250.15(in official version ...) substantially restates existing Penal Law §722b"

However the earlier published Third Interim Report of the Revision of Penal Code York by the same Temporary C ...mission February 1, 1964 Legislative ... in discussing Revision into Categories of Offenses against Public ... and Subdivisions of Loitering said:

Requiring no intent to cause either public or individual harm, it ... enlists a group of acts such as begging and gambling in public, ... hanging around school buildings under suspicious circumstances, and ... the like which are deemed generally unsanitary or ... from a social viewpoint.

§647a 2 Cal. Code 1957 Amendment (amendment from earlier ... by underlined words:
Every person who loiters about any school or public place at or near which children attend or normally congregate is a vagrant.

Cases: In Re Maddison ... 229 Cal App 2d 618, 40 Cal Rptr 581 (1964)
Pribble v. Municipal Ct Los Angeles 25 Cal App 2d ...

Arizona Statute 43-5902 MOLESTING CHILDREN BY LOITERING. (Laws 1950, ... Sec 1. p.27; 1951 Ch 111, Sec 1)
Any person who molests a child under the age of sixteen years ... without legitimate reason loiters about a school ... attendance or a nearby place frequented by ... loiters about a public toilet in a park shall be deemed a vagrant.

Case: State v. Starr 113 P2d 356 (1941)

FREEDOM OF SPEECH ASPECTS

Distributing leaflets is a right granted under the first amendment freedom of speech guarantees. ~~Those~~ This right though broad ~~is~~ is not absolute. It can be limited by the state. ~~when~~ For example the state (or community) has certain paramount interests in preserving certain rights to control the streets of the statute abridging the right of speech is appropriately and narrowly drawn eg. Cox v New Hampshire 312 U.S. 569, 61 S. Ct 762. The questions to be asked when a statute regulates freedom of speech are (1) What is the interest deemed to require regulation of speech (2) What is the method used to achieve such ends as a consequence of which public speech is constrained or barred (3) What mode of speech is regulated (4) Where does the speaking which is regulated take place.

Concurring opinion Mr. Justice Frankfurter Kunz v N.Y. 340 U.S. 290 (1951)

Applying this standard to the facts in the present case, it would seem that the interests of society in keep school areas ~~free~~ from disturbances outweighs the freedom of speech interest. The purpose of 722-b is to protect schoolchildren from the problems and dangers of loiterers around schoolyards. While it is questionable whether disturbing

pamphlets can in anyway be termed littering or whether it can be said not to be a legitimate purpose, nebertheless the state would still have the right to limit pamphlet distribution in this case. In the first place given the facts of this case, students were leaving school, the state had a right to maintain order. It was discretionary for the policeman to decide that the presence of the defendant during this crowded period obstructed order. Secondly the state interest in protecting children overrides the interest of the defendant. Prince v. Commonwealth Mass. 321 U.S. 158 (1943). The dissent in People v. Spowal mentioned that this case which involved the regulation of child labor, was on a much higher plane than the facts in this case. However the important fact in Prince v Massachusetts is that where the interests of the welfare of children and freedom of speech clash, the later give way. The policeman did not absolutely censor speech; rather it was only a temporary incursion. He asked petitioner to distribute leaflets down the street so as not to interfere with

the students entry or leavy school.

An argument ought be made that the state has no right to regulate the area around or adjacent to the school, that only school property should be included. ~~[illegible]~~ 7226 was too broad in including the same standards of regulation for school property as for adjacent areas. Most state statutes which have the "on" or around school property "breath of regulation make certain to say that "loitering" does not include a legitimate purpose, ~~only~~ that it is only an offense if "idling etc." A question arises whether distributing pamphlets would come under this. ~~[illegible]~~ Bailey v Dennis 208 NYS 2d 52 (1960) upholds this view that statute prohibiting loitering in school building has no application to loiterers in the vicinity of school. It should be noticed that the new Penal Code §240.35 ~~[illegible]~~ adds in loitering in or about school, "the legitimate reason for being there." The areas surrounding the school because they are goals of access and departure are just as important to the interest of the state

in the welfare of school children as the schoolyard itself.

looking at the issue of free speech from a political viewpoint, it seems doubtful that a court would uphold the petitioners right to distribute pamphlets on a free speech basis. ~~Fourth~~ 5) The statute 7226 was passed upon an urgent plea by the school board about the conditions surrounding schools (See research material). By allowing the petitioner ~~voluntary aid~~ to distribute ~~political~~ Corp pamphlets, would not the court also have to allow the distribution of less worthwhile literature. In short feel that this minor

the courts ~~would for that the~~ incursion on speech is worth the preservation of the force of the statute. While loitering convictions are very often violations of due process and in this case of a first amendment freedoms, the facts of this case, and the location — a school — not favorable for a new approach to loitering. A much better case could be had.

— Also Sup Ct decision handed down 11/14/ would probably be unfavorable to this area

on the welfare of school children as the schoolyard itself.

Looking at the issue of free speech from a political viewpoint, it seems doubtful that a court would uphold the petitioners right to distribute pamphlets on a free speech basis. ~~The fourth~~ The statute was passed upon on urgent plea by the school board about the conditions surrounding schools (See research material). By allowing the petitioner ~~actually~~ to distribute ~~political~~ Communist pamphlets, would not the court also have to allow the distribution of less worthwhile literature. In short the courts would feel that this minor ~~would not see that the~~ incursion on speech is worth the preservation of the force of the statute. While Loitering convictions are very often violations of due process and on this case of a first amendment freedoms, the ~~p~~ facts of this case, and the location — a school, are not favorable for a new approach to loitering. A much better case could be had.

— Also Sup Ct decision handed down 11/14/ would probably be unfavorable to this area

NYU - Vagrancy Concept reconsidered NYU L Rev 37:102 Ja '62

1963 Supp

ABBOTTS

Vagrancy

Breach Peace I

Violation of Pk dept rule prohibiting Mun Corp 640

Parker, rule prohibiting after midnight as not ultra vires
School Premises - Schools 20
Bulldogs + Guards
Application of law
Const Law 274
Schools 10, 20
Disorderly Conduct conviction
Disorderly Con. 1, 3

People v Parker 138 NYS 2d 2 208 Misc 978 - F 171 S 2d 747

Bailey v Dennis 208 NYS 2d 522 (1964) - See 367 SW 2d 547 - Dissent - 258 S 2d 40

Const 90, 91

ALR

DISORDERLY CONDUCT IN DISOBEYING COP'S ORDER TO MOVE ON IN ST 65 ALR 2d 1152

Am Jur - Disorderly Conduct §§ 3, 4

Check legis debates of latter Part (1954)

Booth v Ill 184 US 425 - ~~Forty Extract Co v Lynch 226 US. 192~~

~~Otis + Glassman v Parker 187 US. 606~~

Ariz Statute upheld - State v Starr 57 Ariz. 220 113 P. 2d 356

✓ People v Sprowal, 1966 49 Misc 2d 806, 268 NYS. 2d 444

People v Firth 3 NY 2d 472 168 NYS 2d 949 146 NE 2d 682 =

Criminal statute must be unfamiliar on its face

People v Dennis

1. FACTS: D did not have child enrolled at school - d arrived to
from entirely entrance school property on public highway + were requested
not to enter then they did. Group was going to have a sit-in

People State NY v Carcel 3 NY2d 327, 165 NYS2d 113, 144 NE2d 81
65 ALR2d 1145 (1957)

D's distributed leaflets in front visitors entrance to UN + refused to move. Penal Code prohibited conduct whereby breach of peace occasioned. Though acts committed in such a manner as to annoy disturb interfere w, obstruct or be offensive to others or Though congregate w others on a public st + refuse to move. Ds who asked to move refused to - Sent not enough evidence to convict here of Breach of Peace = no violence. Security more than necessary of people is required to support a conviction under 722(2) = Probably etc

Refusal to disperse 3) Before refusal to heed policeman's order can serve as basis for conviction under sub 3 = must be shown Ds were congregate w others at the order refused = not case

See Annotation = : + People v Dick 2 (1900) 4 NY 2d 467 ?
176 NYS 2d 313, 151 NE2d 871

722 NY = loitering: disorderly conduct must be w 2ND person

PEOPLE v PARKER 138 NYS2d 2 (1955)

D entered school w/o permission for 3 wks. Unauthorized presence is said to be in violation of §722-b Penal Code

Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any public school bldg or grounds w/o written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use shall be guilty of disorderly conduct.

ISSUE D attacks statute as too vague, indefinite + uncertain

[4] legislative: to prevent certain abuses which had either arisen + prevailed in the public schools or which were likely to arise. Evils had to be nipped in the bud. Object of the section was to "combat an increasing difficult situation in respect to intruders and loiterers in and about the schools" and it aimed "to protect the children, the school personnel + Bd Ed property (memorandum in support of Bill submitted by New York City Bd Education)

[9] Meaning of the word "loiter" as employed in the section is sufficiently definite + certain to advise the public generally what acts and conduct are prohibited People v Bell 306 NY 110, 113, 115 NE2d 821, 822.

loitering is word in common usage whose meaning is well understood + in the case of this offense, the expression 'any person who loiters' is specific enough

[10] People v Berger Gen. Sess., 169 NYS 317, 320 loiter = slow in moving bodily, idler; to be dilatory; to spend time idly; to saunter; to lag behind

[5] There can be no question of the legis's rt to enact a law forbidding persons from loitering on school premises, especially when students are in attendance. If such a necessity existed, and surely it does, to protect school children against loiterers, legis had authority to do so. The peace and safety of school children when threatened and the call for exercise of police powers of State for their protection. Evils to be corrected are well known.

People v Parker (2)

[16] Cal. Ariz. have similar statutes

p11 Cal § 647 (a) (2) every person who loiters about any school or public place at or near which school children attend or who loiters in or about public toilets in public parks, is a vagrant and is punishable.

ARIZ 43-5902 MOLESTING CHILDREN OR LOITERING: Any person who molests a child under the age of 16 yrs or who w/o legitimate reason loiters about a school where children are in attendance or a nearly place frequented by school children, or who loiters about a public toilet, a perk shall be deemed a vagrant (LAWS 1939, Ch 13 Sec 1, p. 27; 1951 Ch. 111 Sec. 2)

Phillips v Municipal Ct City L.A 24 Cal Appl.2d 453, 75 P2d 548 (1938) - D contended clause was so uncertain + indefinite as to continue both state + Fed. court

Verb 'loiter' means to linger idly by the way, to idle'

Argument that statute is too inclusive = innocent people : must fail That some innocent people may desire to loiter near a public school does not deprive the legislature of its power to prohibit loitering at such a place if the safety of school children require such legislation [See Booth v Ill

12 [22-23] There is no right inherent or exist. to transact personal business w/ in limits of a public school. * The exercise of such rt must yield to the legislative power properly exercised over public schools for the primary objects for which they were established. The rt of public in regard to their schools for purposes connected w. education, provided they are used lawfully for that purpose. Even rt of such use is only to reasonable legis for the gen'l good. Fact that no intent to breach is immaterial.

(p 5)

3 Part 1
McKINNEY'S

§722-b Added 1958

1. Constitutionality:

§ not unconst. on ground of lack of standards and appropriate definition People v Johnson, 1959 6 N.Y.2d 549, 190 NYS 2d 698 161 N.E.2d 9

NEW LAW

§ 240.35 LOITERING

A person is guilty of loitering when he

5. loiters or remains in or about a school building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil or any other specific, legitimate reason for being there, and not having written permission from the principal; or

6. loiters, remains or wanders in or about a place w/o apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purpo

In the Proposed NY Penal Law - Drafted + Recommended by the Temporary State Commission on Revision of the Penal Law + Criminal Code (1964) The commission staff notes p. 390 §250.15 "say substantially restates existing Penal Law 722-b

3rd Interim Report of The State of NY Tanporay Commission Revision of The Penal Law and Criminal Code Feb 1, 1964 legislative Document 14

Discussay Revision into catagories of Offenses against Public Order and subdivision of Loitey: "Requiry no intent to cause either public or individual harm, it collates a groups of acts, such as beggy and gambly in public hangig around school buildys under suggestions circumstances, and the like which are deemed generally unsalutary or unwholesome from a social viewpoint

People v Sprowel

FACTS: p.446 "Officer Guentz inquired of d-app what group intended to do and Sprowal replied that they planned to distribute literature in front of the school. Officer said couldn't distribute in part of school; That they could distribute the leaflets on corner or another block, but that they could not interfere w students coming in or out of school. Facts also showed that Sprowal was interfering w dismissal of students — [Not restriction on speech - allows him to speak down out - There was no discriminatory application - Speak is selective at - Minor incursion here

PRINCE v COMMONWEALTH: Higher grade probation because they are students

DISSENT'S Argument of Higher Rank Speech — It is illegal restraint on free speech

Cal Code §647(e) 1957 amnd = "Every person who loiters about any school or public place at or near which children attend or normally congregate is a vagrant" [Expands scope of statute]

Phillips v. Municipal Ct L.A. (1938) 25 C.A.2d 453 75 P.2d 548 - Person penalty as a vagrant any person "who loiters about any school or public place at or near which school children attend is constitutional in view of legis.'s power to protect children as against contention statute was too vag

Punishy as vagrant any person who "loiters" about school or public place verb "loiter" has a well recognized meaning in ordinary use and means to linger idly by the way, to idle

* In Re Huddleson (1964) 40 Cal. Rptr 581, 229 C.A.2d 618 — Loitering w/i. This section prohibits loitering near schools refers only to lingering and idly engaged in for evil or sinister purposes as when it is apparent from totality of person's actions and under circumstances that it may be reasonably concluded that it is engaged in for purpose of committing

VAGUENESS OF "LOITERING" IN STATUTE

Morelli v NY (1961) Loiter: Forbids loitering w/1,500' of waterfront facilities

Loiter was term of common or accepted meaning when taken by staff + has no criminal implications but "The clarity and certainty necessary to satisfy constitutional requirements may be acquired, however, by reference to the context in which the term is used. eg here it was loitering about waterfront w/o lawful business

STATE v STARR 113 P2d 356 (1941) - Upholds Any statute uses Webster definition of loitering + says it does not signify anything bad or criminal except when given such significance in criminal ordinance

If Statute did not affect those w legitimate reason: it confines its prohibitions to loitering about any school or public place - Those who have legitimate reasons to be there are not regarded

Speech + distribution of pamphlets is legit, not loitering: under new Rule, Cal Rules + Any rule it would not be loitering

People v Sprowel

FACTS: p.446 "Officer Guenty inquired of d-app what group intended to do and Sprowal replied That they planned to distribute literature in front of the school. Officer said couldn't distribute in front of school; That they could distribute the leaflets on corner or another block, but That they could not interfere w students coming in or out of school. Facts also showed That Sprowal was interfering w dismissal of students — [Not restriction on speech - allows him to speak does not - There was no discriminatory application - Speech is valid at - Minor inconvenience here

PRINCE v Commonwealth: Higher grade probation because They are students

DISSENT'S Argument of Higher Rank Speech — It is illegal restraint on free speech

Cal Code §647(6) 1957 amnd = Every person who loiters about any school or public place at or near which children attend or normally congregate is a vagrant is a vagrant [Expands scope of statute]

Phillips v. Municipal Ct L.A (1939) 75 P.2d 548 - Pasadena 25 C.A.2d 453
penalizes as a vagrant any person "who loiters about any school or public place at or near which school children attend is constitutional in view of legis.'s power to protect children as against contention statute was too vag

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crime as opportunity may be discovered, and Thus section was not so vague + indefinite as to offend constitutional guarantees, did not unwarrantedly or abridge personal rts + liberties, and possessed requisite uniformity of operation.

Huddleson maintained statute was too vague, unreasonable and arbitrary because it held statute was unconst. Maintained that words of such a broad and all embracing character as to encompass innocent as well as objectionable actions - at 883 loiter = to be slow in moving; delay; linger; saunter; lag behind - Taken by itself term has no criminal implications but employed in a penal statute it may have a sinister or criminal import.

Restricted meaning: loiter was studied to proscribe lingering about schools and public places for the purpose or w the intent of effecting some criminal act

Effort to construe statute constitutional: where words have a broad + restricted meaning, if apparent object of statute will be subserved by construing them in restricted sense: restricted interpretation will be preferred

loitering condemned in 647(d) is loitering in its restricted + sinister sense. H includes (lingering), waiting, and delaying but only for a sinister or wrongful purpose and therefore excludes such activities for lawful purpose - Only when loitering might lead to commission of crime that it is proscribed

Peop Phillips v Municipal Ct 1938 34 Cal' App 2d 453, 75 P 2d 648. Mere fact that some unfit people may desire to loiter near a public school does not deprive the legislature of its power to prohibit loitering at such a place if the safety of school children require such legis. action

VAGUENESS OF "LOITERING" IN STATUTE

Morolla v NY (1961) Loiter: Forbids loitering w/1,500' of waterfront facilities

Loiter was term of common or accepted meaning when taken by itself + has no criminal implications but "The clarity and certainty necessary to satisfy constitutional requirements may be acquired, however, by reference to the context in which the term is used. eg here it was loitering about waterfront w/o lawful business

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If Statute did not affect those w legitimate reason: it confines its prohibitions to loitering about any school or public place - Those who have legitimate reasons to be there are not regards

Speech + distribution of pamphlets is legit, not loitering: under new Rule, Cal Rule + Any rule it would not be loitering

PEOPLE v DENNIS (1960)

Police was 60 feet from school asked if members of ds families were at school. They were not. Said ds should not be 30' from school ds were arrested. Ds wanted to enter school to get interview to register their children

[4] Facts distinguishable from People v Perlin and People v Solmson

Ct ruled Dennis was citizen of good moral character + of good repute [different from type of people thought to be included in purpose of statute against dope peddlers. Same distinction applies in present case]

[6] Definition loiter: Must mean to linger or tarry on school property w/o any reasonable or proper motive for being on school property. D's had st to be on such property

[7] loitering was for a legitimate purpose which ds had constitutional st to ~~decide~~ pursue

[8] 7022-b is not applicable in instant case

[9-10] Policy desired by people would lead to unlimited restrictions

[13] Where a restriction is placed upon a citizen's use of a public area restrictive legislation must contain some definite and ascertainable standards. Nothing on this record indicates that the conduct of the ds constituted either illegal loitering or presence on school grounds for anything other than a legitimate purpose.

* Only when such conduct of citizens covertly affects the proper and normal conduct of a school would we believe that the legislature would have a constitutional ~~right~~ right to impose a limitation upon such conduct.

PEOPLE v JOHNSON 6 N.Y2d 549, 190 NYS2d 694 (1959

D entered school grounds illegally
Dye 722d legal need to ~~enforce~~ forbid people harboring some illegitimate purpose
In Dissent Fuld attacked the statute as not being informative

PRINCE v Massachusetts (321 U.S. 158 (1943)
State statute providing that no boy under 12 or girl under 18 should sell periodicals on street was constitutional. Claim of immunity from regulations of religious activities were subordinated. The interest of the state in protecting its children.

MEMORANDUM - RE: CERTIFICATE OF REASONABLE DOUBT

TO : NEW YORK CIVIL RIGHTS ATTORNEYS

FROM : GEORGE SCHIFFER

Attached are forms for a motion for certificate of reasonable doubt. These forms consist of the following:

1. Notice of Appeal, which notice is directed to the Court from which the appeal is taken. This notice must be filed with the clerk of that Court and served upon the District Attorney. The Clerk normally requires three copies of the Notice of Appeal. These copies will be accepted for filing when stamped with the "Received" stamp of the District Attorney's clerk. Consequently, service on the District Attorney should be effected first.

2. Notice of Motion, Affidavit and copy of Notice of Appeal. These go into one back. They are filed with the clerk of the part of the Supreme Court which will hear the motion. Please note that the District Attorney can and normally does waive the notice requirement when defendants are likely to be held in jail pending determination of the motion.

3. Order granting the Certificate of Reasonable Doubt. The order may be handed up when the motion is heard.

Talk to the Assistant who will have charge of the motion before filing. This may be either the Assistant who tried the case, his superior in charge of that portion of the trial bureau, or someone in the appeal bureau.

Some Assistant District Attorneys will not object to the issuance of the certificate and will also agree either to continuance of parole or continuance of bail in the existing amount. A new bond will be required.

Have enough copies of the order to furnish one signed original for each defendant. These will be required, together with the bail release, to get the defendant out if he is in.

4. Of primary importance is the following: Upon conviction, the Court has the power to stay execution of the sentence for a few days in order to permit the filing of the application for Certificate of Reasonable Doubt. This must be requested. This also permits you to make arrangements to have the bail bondsmen on hand, etc.

If for any reason the stay is denied, tell Department of Correction that application for certificate is being made. The certificates are almost always granted, if only because the sentences are short and, if it is intended to appeal, the appeal may become moot because it will take longer to perfect the appeal than the sentence. Correction should therefore be requested to hold the defendant in the courthouse rather than shipping him/her to Hart Island or the Women's House of Detention. Correction should be particularly requested to cooperate, because we have the right to serve the bail re-

leases at Commissioner Kross at her home (in which case she must produce the defendants at her home). If possible, the defendants should be spared the shipping out, physical examination.

Women defendants should particularly notified that they cannot be required to submit to internal physical examination. If they refuse to submit, they will be isolated with each other, or put to separate dormitories. They cannot legally be forced to undergo internal examination.

Counsel should be prepared to argue the motion, even though it is usually granted.

Please note : Trial counsel are not committed to taking these cases on appeal. Trial counsel may take them on appeal if they desire to do so. Counsel should specifically notify George Schiffer upon the conclusion of trial as to their intention with regard to appeals. Trial counsel are obligated to seek the certificate of reasonable doubt since this procedure must be followed rapidly or defendants may find themselves jailed.

It is suggested that upon conviction, if counsel feel there is a likelihood of a jail sentence, the 48 hour period not be waived so as to provide time for the completion of the papers.

July 9, 1964

G.S.

M E M O R A N D U M

FROM: C O R E LEGAL STAFF

RE: PROCEDURE FOR OBTAINING CERTIFICATE OF REASONABLE DOUBT

Following is the step by step procedure for obtaining Certificates of Reasonable Doubt. Counsel should refer to the Memorandum already circulated specifying the papers necessary, together with sample Notice of Appeal and Affidavit. Enclosed herein is a sample Order, which will be signed by a judge of the Supreme Court when the Certificate of Reasonable Doubt is granted.

Counsel should also note that the number of papers called for in this memorandum are the minimum required by the courts and the District Attorney's office, and should therefore have sufficient extra copies for their own office records.

As soon as you leave the courtroom in which the sentence is imposed, call the Department of Correction (RE 2-3839). This number reaches the pens at 100 Center Street (BO 1-3700, Ext. 7 or 8 is the similar Queens number). Tell a responsible officer that you are getting a Certificate and ask that the defendant be kept in the pens or, if absolutely necessary, transferred to the Tombs (not shipped to Harts Island or Brooklyn).

The next step is to alert the bail bondsman and to arrange for payment of the bail fee.

Then, after getting the papers typed, proceed as quickly as possible. Remember that between 4:00 P.M. and 8:00 P.M. it is virtually impossible to get a bail bond signed by a judge.

1. Serve one copy of blueback containing the Notice of Appeal on the District Attorney's clerk's office (e.g., in New York County, at 155 Leonard Street, 7th floor), and have them certify "Copy Received' on three copies which will be filed in the court from which the appeal is being taken (e.g., Criminal Court).

2. Serve blueback containing Notice of Motion, Affidavit and copy of Notice of Appeal, to the Appeals Bureau of the District Attorney's office (e.g., in New York County at 155 Leonard Street, 8th floor rear), and have them stamp the D.A.'s consent to the issuance of the Certificate. (They normally do this). When the D.A. consents to the granting of theCertificate, he will also recommend bail. In our cases this has usually been $500.00.

If after discussing the matter with them, theAppeal Bureau will not consent to the granting of the Certificate, this second blueback will have to be served on the D.A.'s Clerk's office. Even if the Appeal Bureau will not consent to the Certificate, it will usually waive the 48-hour notice.

3. Serve three copies of the Notice of Appeal on the Clerk of the Criminal Court of the City of New York (e.g., in New York County, on the 3rd floor, South side, behind cages, at 100 Center St.) and have them mark "Copy Received" on file copies.

4. Take original blueback (including Notice of Motion, Affidavit and copy of Notice of Appeal; and stamped by the D.A.) to the Supreme Court, Part XXX (in New York County, 100 Center St, 11th floor) and give it to the clerk along with an original and three copies of the Order, to be submitted to, and signed by, the Judge. Some judges require argument.

(a) The court keeps the original Order.

(b) The clerk will return the three copies, one of which is marked "Duplicate Original." This is for your file.

(c) Another is to be certified by the attorney thusly:

Certified by myself, Jules D. Zalon
Attorney at law
(signature)

This is given to the bail bondsman, to be used in obtaining the release of the defendant.

(d) The third is filed back in the same office of the Criminal Court where the Notices of Appeal were filed.

COUNSEL ARE REMINDED THAT THE SENTENCING PROCLIVITIES OF MANY JUDGES ARE UNPREDICTABLE. COUNSEL ARE CONSEQUENTLY ADVISED TO HAVE APPLICATIONS FOR CERTIFICATE IN COURT ON SENTENCING DAYS.

JDZ

11/17/64: GS

[1964]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF

----------x

PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against- AFFIDAVIT

Defendant-Appellant.

----------x

STATE OF NEW YORK)
COUNTY OF) SS:

, being duly sworn deposes and says:

That he represents the above named defendant in the prosecution of his appeal to the Appellate ~~Division~~ Term of this Court.

The defendant was arrested on and charged as follows:

with the misdemeanor of violating §1851 Penal Law.

That the defendant was tried before the Honorable Judge , in the Criminal Court of the City of New York on , and convicted of the misdemeanor charged and sentenced as follows:

That Notice of Appeal was duly filed and served on the District Attorney of County and the Clerk of the Criminal Court of County on , and notice requirements were waived by the District Attorney.

That the stenographic minutes of the trial have been ordered by the defendant herein and will be available to this learned Court.

That the Court below was in error in convicting the defendant herein as follows:

1. The defendant is a responsible citizen, acting, as the record shows, in good faith and in the belief that the activity was necessary for the benefit of the public. The defendant did not act for personal gain or with criminal intent, but through moral conviction.

The defendant is not criminal. He is usefully employed. He committed no act of violence. Consequently, no purpose is served by incarcerating him. In the circumstances, the sentence imposed was grossly excessive.

2. That the Court below erred in excluding proof offered by defendant on the issue of his intent.

3. The People failed to prove beyond a reasonable doubt violation of any part of §1851 of the Penal Law.

a. That the People failed to prove the identity of the defendant.

b. The People failed to prove thatthe duration of alleged offense was such as to constitute the offense.

c. That the People failed to prove that there was any intent to commit a breach of the peace or that circumstances existed whereby a breach of the peace might be occasioned. On the contrary, the circumstances were wholly within the scope of the doctrine of Edwards vs. South Carolina, 372 US, 229,83 S.Ct. 680 (1963), in that there were ample police to prevent any outbread of violence. Since the

demonstration was a peaceful demonstration, the existence of ample police reserve and ample police present meant that there was no occasion for police interference with the demonstration.

d. Tht there was no proof that the defendant in any way actively resisted any police officer. On the contrary, the proof was that the defendant did not actively interfere with the police officer or resist him. The evidence is that in fact several officers carried the unresisting defendant away.

4. The constitutional right of the defendants against self-incrimination was violated by their being required, over their objection, to identify themselves by appearing before the Court upon calendar calls and at trial in such a way that, in the presence of the police officers, they were clearly and individually named.

5. The grounds of World's Fair Corporation have been held to be public property, Farmer vs. Moses and the authority cited herein. The arrest of the defendants constituted a violation of their rights under the Constitution of the State of New York and the Constitution of the United States, to assemble peacefully, to petition for redress of grievance and to free speech.

6. The statutes under which defendants were charged are unconstitutionally vague and uncertain. Further, the evidenciary standards apparently required under the statutes are such as to deprive defendants of due process.

7. The defendants participated in a peaceful demonstration sponsored by a responsible, national civil rights organization, against inequities and discriminatory practices

within the jurisdiction of the sponsors of certain pavilions at the Sorld's Fair. The defendants sought to express their views to the public and to the sponsors of the pavilions by these demonstrations on the opening of the World's Fair, April 22, 1964. Pursuant to a plan or scheme to deny the defendants their constitutional rights, World's Fair 1964-1965 Corporation, acting in concert with Pinkerton National Detective Agency, Inc., and the police department of the city of New York, caused the defendants to be arrested, among several hundreds other persons. The resulting state action in support of discriminatory practices constitute a denial of defendants' rights to equal protection of the law under the 14th Amendment, as well as a denial of their rights under the First Amendment of the United States Constitution and the correlative rights under the Bill of Rights in the Constitution of the State of New York.

Substantial questions of fact on law exist in these cases which should be reviewed by the Appellate Court.

No previous application for the relief sought herein has been made to this Court or any other Court.

_____

Sworn to before me this

day of , 1964.

_____

Notary Public

At a Special & Trial Term Part
of the Supreme Court, held in and
for the County of at
the Courthouse,

on the day of ,
1964.

P R E S E N T

HON.

JUSTICE

----------x

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

Defendant-Appellant.
----------x

The above named defendant having been convicted in the Criminal Court of New York City, County of , Part thereof and sentenced therein, and having appealed from said judgment of conviction to the Appellate Term of the Supreme Court, and having moved before this Court for a Certificate that in its opinion there is reasonable doubt whether such judgment of conviction should stand, and for an order continuing the defendant on bail pending the determination of the said appeal; and the said motion having duly come on to be heard on the day of , 1964, and after hearing , attorney for defendant, in support of said motion and due deliberation having been had thereon

NOW, upon reading and filing the Notice of Motion dated , 1964, and the affidavit of sworn to the day of , 1964, together with

proof of due service, thereof and upon the record of the trial held in the aforesaid Criminal Court and for the reasons set herein, the motion is granted and it is

CERTIFIED, that it is the opinion of this Court that there is reasonable doubt whether the judgments of conviction rendered against the defendant in Criminal Court of New York City, County of , on the day of , 1964 against:

should stand by reason of the fact that there are questions of law and fact which merit the attention of the said Appellate Term, and it is further ORDERED, that the defendant be released from custody upon posting of bail of $, during the pendency of such appeal.

E N T E R

Justice Supreme Court

CRIMINAL COURT OF THE CITY OF NEW YORK

County of New York

The People of the State of New York	:	
Plaintiff-Respondent	:	Docket No. C11355
vs.	:	
		Notice of Appeal
William Sprowal	:	
Defendant-Appellant.	:	

PLEASE TAKE NOTICE, that the above named defendant appeals to the Appellate Term of the Supreme Court, First Judicial Department, from the judgment on a conviction of the offense of disorderly conduct (Sec. 722(b)). Sentence was imposed on the 10th day of November 1964 in Part III of this Court. Defendant was sentenced to serve sixty days imprisonment.

PLEASE TAKE FURTHER NOTICE, that the grounds for taking this appeal are that the said judgment is contrary to law and against the weight of evidence.

Dated, the 10th day of November, 1964.

Lloyd McAulay

Lloyd McAulay
Attorney for Defendant-Appellant
165 Broadway
New York, N. Y. 10006
WOrth 4-7030

Procedure for obtaining Certificates of Reasonable Doubt

Serve one copy of Notice of Appeal on D.A.'s office (155 Leonard St. 7th floor) and at the same time, have them certify Copy Received on three copies (for Criminal Court)

Serve buleback containing Notice of Motion, affidavit, and copy of Notice of Appeal.....to the Appeals Bureau of the D.A,'s office (Dick Uviller) (8th Floor)and have them certify Copy Received on the original of this blueback (for the Supreme Court);and stamp it

Serve three copies of the Notice of Appeal on the clerk of the Criminal Court (100 Center St. 3d fl; So. side behind cages) and try to get them noted received.

Take original of the big blueback to the Supreme Court, Pt XXX (100 Center St., 11th floor) and give the cl'k the large blueback, and four/five Orders, to be submitted to the judge, to be signed

The court keeps the original of the Orders

The clerk gives you back three copies, one of which is marked "Duplicate Original." This one is for your file-----
Another is certified by the attorney, thusly:
Certified by myself, Jules D. Zalon, atty-at-law, (and sign it)
This one is given to the bail bondsman, to be used in obtaining the release of the defendant-

The third is filed back in the same office of the Criminal Court where the Notices of Appeal were filed.....and there need be no Copy Received noted thereon/in-

Serving Certificates of Reasonable Doubt:

3. File three (3) copies of the Notice of Appeal with the clerk of the ~~Appxxxxxxxxxxx~~ Crim. Court .....third ~~xxi~~ floor (So. side) of the Criminal Court Building, 100 Center Street, N.Y.C.

+ have them certify CRD (4 self)

Also have them certify Copy Received for the following:

~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~

b) the blueback going to the S. Ct., Part XXX; this may be
c) office file the same one stamped by D.A. already-
d) additional copies as may be wished

1. File with the clerk of the D.A.'s office (155 Leonard St.) ~~the~~ one blueback: ~~first~~ → the copy of the Notice of Appeal ONLY

second: the blueback containing the Notice of Motion, the affidavit, a copy of the Notice of Appeal ----->

Also, have them certify Copy Received for the following:

a) the two bluebacks going to the S. Ct.
~~b) two bluebacks which the Appeals Bureau of the D.A.'s office might wish~~
c) office file
d) additional copies as may be wished,

Also have them certify Copy Received on at least three more copies of the Notice of Appeal, which are then taken to the clerk of the Criminal Court

2. Take papers to the Appeals Bureau of the D.A.'s office, serve (Dick Euviller) and attempt to have him stamp something to the effect that his office has no objection to the granting of the order-

If he does not authorize this stamp, be certain that the papers contain a statement to the effect that the D.A.'s office waives notice of the motion (time element)

4. Take all the papers to the Clerk of the Supreme Court, Part XXX- If the judge is still sitting (and he'd better be), he may ask for reasons why the order should be granted: so be prepared to argue the motion, e.g., the statute is unconstitutional on its face;; excessiveness of sentence; etc.; that, unless the order be granted, the appeal may become moot because it would take longer to perfect the appeal than the sentence.

5. Take signed order, ~~which is returned to you, together with~~ a ~~duplicate xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~

the City of New York, but that they could not interfere with the students; that thereafter he asked defendant to stop handing out the leaflets and not to block the way of students being dismissed; that defendant refused and sat down on the street; that two others of the group refused to move away from the school and continued handing out literature within five feet of the entrance to the school, and that defendant and others were then placed under arrest. In the Court of Appeals defendant argued that the police officer's testimony failed to show defendant's guilt under the statute; that the statute, if applicable to the facts here involved, is unconstitutional because it imposes a ban on the distribution of constitutionally protected literature on a public street; that, to the extent that the statute applies to constitutionally protected conduct, the requirement of prior approval by the school principal or custodian renders the statute void as an unconstitutional prior restraint on free speech and publication; that the statute insofar as it applies to conduct not actually on school property is void for vagueness, and that the sentencing court abused its discretion in imposing a 60-day sentence on defendant.

Lloyd McAulay for appellants.

Frank S. Hogan, District Attorney (*Frederick P. Hafetz* and *H. Richard Uviller* of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: Chief Judge DESMOND and Judges VAN VOORHIS, BURKE, SCILEPPI and KEATING. Judges FULD and BERGAN dissent and vote to reverse and to dismiss the complaint on the dissenting opinion at the Appellate Term.

JOHN H. PETERSEN, Appellant, *v.* FORTY-FIVE NEVINS STREET CORPORATION et al., Respondents.

Argued April 26, 1966; decided June 9, 1966.

Negligence — elevators and escalators — evidence of prior falls — in action to recover for injuries and aggravation of pre-existing conditions, sustained when plaintiff's foot caught as he was leaving "controlled" automatic elevator which had stopped below floor level, trial court dismissed complaint as against managing agent of building, at close of plaintiff's case, directed verdict in favor of company which installed and serviced elevator and [illegible] in favor of owner of building [illegible]

Richard J. Burke, Joseph Rothbard and *Leo Rothbard* for appellants.

Joseph C. Scibilia for respondents.

Order affirmed, without costs; no opinion.

Concur: Chief Judge DESMOND and Judges FULD, VAN VOORHIS, BURKE, SCILEPPI, BERGAN and KEATING.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* WILLIAM SPROWAL, Appellant.

Argued May 3, 1966; decided June 9, 1966.

Crimes — disorderly conduct — defendant was convicted of violation of section 722-b of Penal Law, which renders one guilty of disorderly conduct who loiters in or about school buildings or grounds without permission from principal or custodian or in violation of posted rules — evidence that defendant, handing out leaflets at school, refused to stop blocking way of students, sat down on street, refused to move and continued handing out leaflets — contentions that statute was unconstitutional as imposing ban on distribution of literature on public street, that requirement of prior approval by principal or custodian was unconstitutional prior restraint on free speech and publication, that statute was void for vagueness, and that court abused discretion in imposing 60-day sentence — judgment of conviction properly affirmed.

People v. *Sprowal*, 49 Misc 2d 806, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from a judgment of the Appellate Term of the Supreme Court in the First Judicial Department, rendered January 13, 1966, affirming a judgment of the Criminal Court of the City of New York, County of New York (REUBEN LEVY, J.), convicting defendant of the offense of loitering in a school building in violation of section 722-b of the Penal Law. An appeal by a codefendant Steven Gordon was withdrawn. Section 722-b of the Penal Law provides: "Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct." A police officer testified that he told defendant and others that they could hand out leaflets near the Charles Evans Hughes High School on 18th Street in

Steve: This case may prove useful some time

good whatsoever could be served by appointment of counsel." The U.S. Supreme Court in Douglas observed that "where the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."

If the Constitution insures that an indigent who desires counsel for the prosecution of his one and only appeal should have one, is it reasonable to say that the guarantee is fulfilled by appointment of counsel who adds the weight of his opinion to the position of his client's adversary? "We think not."—Ely, J.

—CA 9; Harders v. California, 1/25/67.

Statement obtained during Federal Bureau of Investigation pre-arrest interview that accused voluntarily attended is not supressible even though he was not informed of his right to be furnished counsel without charge.

A literal and superficial reading of Miranda v. Arizona, 384 U.S. 436, 34 LW 4521, might call for a decision granting this motion to strike. But the facts of the four cases reviewed in Miranda aren't like the facts in this case. Here the accused came voluntarily to the FBI the day after he was invited, with full opportunity in the meantime to have consulted counsel if he had so desired; he was never in custody and was told he was free to leave at any time; he was told at the outset of his right to remain silent and to consult counsel and that anything he said could be used against him; and he never asked for counsel. It is literally clear in this case that the defendant was not advised that he had a right to an attorney to be furnished free to him by some governmental agency.

He was told that he had a right to consult an attorney under the usual FBI procedure, which, by the way, is praised in the majority opinion in Miranda and termed "consistent with the procedure which we delineate today." It is hard to understand how the majority could say that the FBI procedure would have been adequate if the majority opinion literally means what it says with respect to the rules laid down in Miranda. There must be some leeway to determine on the facts of this case, notwithstanding the literal rules laid down by the majority opinion, whether or not there was a deprivation of rights that calls for the drastic remedy of supressing the confession.

District courts should proceed carefully and not apply too literally and indiscriminately the broad rule as laid down in Miranda, where, as in this case, they do not find a situation that cries out against the conscience, a situation that per se indicates undue pressure.

This court cannot extend the scope of Miranda beyond the facts of the four cases cited and reversed, and the two cases overruled; this case presents no facts as drastic as any of those cases. If a line is to be drawn further defining the extent to which the Miranda rules apply on the facts, it should be drawn by the higher courts.—Tavares, J.

—USDC Hawaii; U.S. v. Kauffman, 2/6/67.

SELF-INCRIMINATION—

Neither Self-Incrimination Clause nor Due Process Clause entitles New Jersey defendant to refuse taking of pre-trial tape recording of his voice, using any words he chooses, since recording constitutes mere voice identification test.

This court is in no way passing upon the admissibility into evidence of the tape recording. Moreover, the requested recording will be words concerning any subject on which the defendant wishes to speak. The words will in no way be related to the indictments now facing him. Although this case is a novel one in this state, the underlying principles are not.

There is a close analogy between the question in this case and that involved in Schmerber v. California, 384 U.S. 757, 34 LW 4586. Schmerber pointed out that the privilege against self-incrimination protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature. In a footnote, the Court also noted that the terms "testimonial" and "communicative" did not apply to evidence of acts, non-communicative in nature as to the person asserting the privilege, even though such acts are compelled to obtain the testimony of others. Thus, the Court concluded that the extraction of blood for analysis in a case involving the operation of a motor vehicle while under the influence of intoxicating liquors did not violate the privilege against self-incrimination.

From this it can readily be seen that we are here faced with the same set of circumstances. It is the impression of this court, based upon a line of cases culminating with Miranda v. Arizona, 384 U.S. 436, 34 LW 4521, that the "communicative" or "testimonial" evidence protected by the Fifth Amendment is that by which the state obtains knowledge solely within the possession of the defendant concerning the crime with which he is accused, such knowledge having been obtained by moral or physical coercion. The tape recording of the defendant's voice does not fall within this ban.

There is still, however, the consideration of fundamental fairness. For even though the tape recording does not violate the Fifth Amendment, if it does not meet the minimum requirements of due process it cannot be permitted. The defendant's voice is clearly a distinguishable physical characteristic. The test will be as objective as a fingerprint. It should, therefore, be considered in that light. Although the weight and effect to be given to any scientific evidence such as this test will ultimately rest with the jury, it is nevertheless important that every effort be made to employ the multifaceted technological advances made by science to insure not only the peace of the citizenry but the freedom of the individual. —Conklin, J.

—NJ SuperCt Essex Cty; State v. McKenna, 2/3/67.

VAGUENESS—

Seattle ordinance punishing wandering or loitering abroad or being abroad under other suspicious circumstances, and being unable to give satisfactory account on demand of police officer, is unconstitutionally vague.

The impermissible vagueness is in the particular phrases: (1) "Wandering or loitering abroad"; (2) "abroad under other suspicious circumstances"; and (3) "a satisfactory account of himself."

A penal statute or ordinance must contain ascertainable standards of guilt, so that men of reasonable understanding are not required to guess at the meaning of the enactment.

The ordinance here in question imposes sanctions upon conduct that may not manifest an unlawful purpose, and, therefore, is violative of due process. The language is too broad. A citizen cannot determine its meaning so that he may regulate his conduct. There is nothing in the ordinance that would enable him to know the dividing line between innocent loitering (for example, window shopping) and criminal loitering. Loitering ordinances that fail to spell out this distinction have been struck down.

The right of a law enforcement officer to inquire of persons wandering abroad at night is limited to those persons whose conduct gives the officer reason for alarm that they are engaged in unlawful activity. The crime, however, cannot be the failure to give answers satisfactory to the officer. If the ordinance means that the legality of a person's action depends upon the opinion of a policeman, it would be unconstitutional.

The importance of loitering ordinances cannot be minimized. They are necessary for the protection of society and for the preservation of public peace. They must, however, be drafted in a manner that protects the rights of the individual as well as the rights of the public.

The best considered comment laying down certain guidelines is found in the Model Penal Code, Proposed Official Draft, Section 250.6 of the American Law Institute (1962).—Weaver, J.

Concurrence. "I am reluctant to recommend" the cited Model Penal Code Section as a model of precision and clarity in defining criminal loitering and prowling. The Code's definition suffers from the same qualities of vagueness and imprecision as the Seattle ordinance.—Hale, J.

—Wash SupCt; Seattle v. Drew, 2/2/67.

WITNESSES—

Texas burglary defendant was deprived of due process by trial judge's ruling, pursuant to State Code of Criminal Procedure, that defendant's separately convicted wife was, as coprincipal, not competent to testify that she alone had committed crime.

The defendant testified that he was returning the goods his wife had stolen. It therefore became imperative to his defense that his testimony be corroborated, if possible. His wife was the only one who could do so. She was not allowed to testify, however, and there were no other witnesses called on his behalf. Under Article 711 of the Texas Code of Criminal Procedure a coprincipal is declared incompetent to testify for another. This is an outgrowth of the common law's abhorrence of "the idea of any person testifying who had the least interest." State v. Barrows, 76 Me. 401.

Beginning early in the Nineteenth Century, attacks were made on the disqualification for interest. Disqualification of interested non-party witnesses in civil cases fell first. Next, party witnesses in civil cases were declared competent. Maine was the first jurisdiction to allow an accused in a criminal prosecution to testify for himself. Texas followed suit in 1889. It would seem that the disqualification of a co-indictee or a codefendant, or a person indicted separately for the same crime should have been removed also; for they were disqualified solely because they were interested parties, and they obviously had less interest in the outcome then did the accused himself. But in the Texas statute, the accused was declared competent to testify "on his own behalf", thus omitting in terms to provide that he be a competent witness on behalf or against another defendant. Notwithstanding the fact, however, that the historical reasons for the interest disqualification rule had been shown to be unsound and the rule was discarded, Article 711 survived successive revisions of the Texas Codes.

The Fourteenth Amendment leaves Texas free to adopt whatever statute or decision she elects concerning the competency of various classifications of witnesses to testify, whether or not her rule conforms to that applied in the federal courts or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.

The application of Article 711 to the defendant here worked a deprivation of his liberty without due process of law under the Fourteenth Amendment.—Dyer, J.

—CA 5; Bonner v. Beto, 2/15/67.

Domestic Relations

DIVORCE—

New Jersey husband's protracted and voluntary addiction to heroin, with resultant attrition of sexual powers and refusal of sexual intercourse, entitles wife to absolute divorce on ground of extreme cruelty.

Without self-justification defendant explains his sexual torpor and denial by saying that he did not love his wife less but loved heroin more.

The touchstone of extreme cruelty is its impact upon the victim. Friedman v. Friedman, 37 N.J. Super. 52. Given harm of the prescribed degree, willfully or indifferently inflicted through behavior having an accepted causal nexus, a case of extreme cruelty is made out. This principle differentiates cases in which the refusal of sexual relations has been held to be desertion rather than extreme cruelty.

Authorities recording objective scientific observation generally confirm the relation between drug addiction and sexual indifference and rejection. While case law on the subject is sparse, in Germain v. Germain, 20 N.J. Super. 565, the question was whether habitual use of drugs and the alleged consequences were sufficiently related by proof. For want of adequate probative demonstration, a divorce on the ground of extreme cruelty was denied.

But here Germain is inapposite, since the proof entirely suffices to bring the case within the four corners of the exposition of extreme cruelty in Friedman.—Consodine, J.

—NJ Super Ct EssexCty; Melia v. Melia, 2/7/67.

Libel and Slander

PRIVILEGE—

Defense contract's requirement that contractor report actual or even suspected compromises of classified information bars suit by employees alleging that they were libeled by confidential report to government concerning possible breach of security, since contractor is clothed with government's absolute immunity.

[*Text*] "To be predominantly emphasized here is that the contract embraces reports by Philco to the government not only of actual but of each suspected compromise of classified information. Equally important, the company has no discretion and is mandatorily ordered to report the suspicion immediately. There is no question but that the system of reporting was valid. The obligation could scarcely be couched in more imperious or exacting language. It embraces both true and false accusations, both substantial and insubstantial suggestions, perhaps encompassing even rumors. It demands investigation of them by the company and a report of it to the Defense Department. That is precisely what Philco did. Faithful to the contract, it could have done no less. The issue, then, is whether in the circumstances Philco may be held answerable for falsity and defamation in the report.

"For its absolute privilege Philco analogizes its position with that of an executive agency of the government. * * *

"The logic of [the Barr v. Matteo, 360 U.S. 564] thesis, we think endues Philco with the attributes of a federal agency in the problem of this controversy. Indisputably, the government by the contract bared and confided State secrets to Philco. * * *

So it was that the company and such of its employees as were confidants were answerable for keeping the nation's secrets, as fully as if they were governed by the oath of a federal official. Closely performing his duties and charged with equal responsibility and loyalty, we think the company and its trusted personnel were imbued with the official's character, and partake of his immunity to liability, whenever and wherever he would enjoy the absolute privilege.

"The further question is whether a federal agency or employee would in the position of Philco and its trusted employees be accorded the unqualified privilege. In this determination we do not encounter the difficult resolutions—particularly the scope of the libeler's duty, and the medium used, to issue the sullying statements—which confronted the Court in Barr v. Matteo. * * *

These are absent here for, as we

Box 41
Folder 6

STATE OF NEW YORK VS. SPROWAL & GORDON

Please Retain Original Order

COURT OF APPEALS
STATE OF NEW YORK

67 CIU 2260

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

WILLIAM SPROWAL and STEVEN GORDON

Defendants-Appellants.

RECORD ON APPEAL

From the Appellate Term, First Department,
of the Supreme Court of the State of New York

Lloyd McAulay, Esq.
Attorney for Defendants-Appellants
Room 1925
165 Broadway
New York, New York, 10006

Frank S. Hogan
District Attorney, New York County,
Attorney for Respondent
155 Leonard Street,
New York, New York, 10013

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STATEMENT PURSUANT TO RULE 5531 CPLR

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

- x

PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

vs. :

WILLIAM SPROWAL and STEVEN GORDON :

Defendants-Appellants. :

- x

1. The index number below is C11353-11356.

2. The full names of the original parties are as set forth above together with the following three defendants: Marianthe Siderelis, Katherine Abel, and James Lanier. The latter three defendants were found not guilty after trial and thus are not parties to the appeal.

3. The case was commenced and tried in the Criminal Court of the City of New York in the County of New York.

4. Defendants were arrested and summoned on May 29, 1964, and tried on September 3 and 4, 1964.

5. Defendants were arrested and summoned for disorderly conduct under Sections 722(3) and 722-b of the Penal Law. Defendants-appellants Sprowal and Gordon were distributing non-commercial leaflets on the sidewalk in the block where Charles Evans Hughes High School is located.

6. As to both appellants this appeal is from the judgment of the trial court rendered on September 4, 1964. As to William Sprowal, this appeal is further from the sentence rendered on November 10, 1964.

7. The appendix method of appeal is not being used.

6. As to both appellants this appeal is from the judgment of the trial court rendered on September 4, 1964. As to William Sprowal, this appeal is further from the sentence rendered on November 10, 1964.

7. The appendix method of appeal is not being used.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

- x

PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

vs. :

WILLIAM SPROWAL and STEVEN GORDON :

Defendants-Appellants. :

- x

Docket No.
C11353-11356

STATEMENT PURSUANT TO RULE II (2)(c)
OF THE RULES OF THE APPELLATE TERM
FOR THE FIRST DEPARTMENT

As to the defendant William Sprowal, he was admitted to bail in the sum of $500 on a Certificate of Reasonable Doubt and Order dated November 10, 1964 signed by Supreme Court Justice Joseph A. Sarafite. Because the case on appeal was dismissed for failure to prosecute and subsequently restored to the calendar, a further Certificate and Order was signed on April 13, 1965 by Supreme Court Justice Irwin Davidson admitting defendant Sprowal to bail in the sum of $500.

As to the defendant Gordon, he paid a fine of $50 on October 19, 1964 to the Clerk of the Criminal Court, Part III.

NOTICE OF APPEAL

CRIMINAL COURT OF THE CITY OF NEW YORK

County of New York

- x

The People of the State of New York :

Plaintiff-Respondent, : Docket No. C11355

vs. :

Notice of Appeal

William Sprowal :

Defendant-Appellant. :

- x

PLEASE TAKE NOTICE, that the above named defendant appeals to the Appellate Term of the Supreme Court, First Judicial Department, from the judgment on a conviction of the offense of disorderly conduct (Sec. 722-b). Sentence was imposed on the 10th day of November, 1964 in Part III of this Court. Defendant was sentenced to serve sixty days' imprisonment.

PLEASE TAKE FURTHER NOTICE, that the grounds for taking this appeal are that the said judgment is contrary to law and against the weight of evidence.

Dated the 10th day of November, 1964.

Lloyd McAulay

Attorney for Defendant-Appellant
165 Broadway
New York, N. Y. 10006
WOrth 4-7030

NOTICE OF APPEAL

CRIMINAL COURT OF THE CITY OF NEW YORK

County of New York

The People of the State of New York Plaintiff-Respondent, vs. Steven Gordon Defendant-Appellant.	Docket No. C11353-11356 Notice of Appeal

PLEASE TAKE NOTICE, that the above named defendant appeals to the Appellate Term of the Supreme Court, First Judicial Department, from the judgment on a conviction of the offense of disorderly conduct (Sec. 722-b). Sentence was imposed on the 19th day of October, 1964 in Part III of this Court. Defendant was sentenced to serve five days' imprisonment or to pay $50 fine.

PLEASE TAKE FURTHER NOTICE, that the grounds for taking this appeal are that the said judgment is contrary to law and against the weight of evidence.

Dated the 17th day of November, 1964.

Lloyd McAulay

Attorney for Defendant-Appellant
165 Broadway
New York, N. Y. 10006
WOrth 4-7030

-1- (Trial)

CRIMINAL COURT OF THE CITY OF NEW YORK

PART 3 - COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK on complaint of Officer Raymond Gruntz -versus- MARIANTHE SIDELLIS - KATHERINE ABEL STEPHEN W. GORDON - WILLIAM SPROWAL & JAMES LANIER	DOCKET NOS. Y 2289 & C-11353 to 11356. CHARGE: Sec. 722-2 and Sec. 722-B Penal Law.

CHARG
New York, N. Y.
Date: September 3rd, 1964.

B E F O R E :

HONORABLE REUBEN LEVY, Judge.
Bridgeman: Jos. Walker

A P P E A R A N C E S :

Gerald Ryan, Assistant District Atty., N. Y. County,
for the People.

Kenyon & Kenyon, Esqs., 165 Broadway, New York, N. Y.,
Lloyd McAulay, Esq., of Counsel, for all defendants.

Defendants all Present.

---oOo---

F. WEINBERG
COURT REPORTER

COURT OFFICER: Calendar Number 17, Docket Number Y 2289, Marianthe Sidellis, and Docket Number C 11353 to 11356, Katherine Abel, Stephen Gordon, William Sprowal and James Lanier, all charged with Violation of Section 722, Subdivision 3 & 722-B, of the Penal Law. Defendants represented by attorney. Counsellor, will you note your appearance with the Court Reporter?

MR. MC AULAY: Lloyd Mc Aulay, 160 Broadway, representing all defendants and there is a co- counsel present.

THE COURT: Are the People ready?

MR. RYAN: The People are ready.

THE COURT: Is the defense ready?

MR. MC AULAY: We are ready.

THE COURT: Call the first witness, please.

MR. RYAN: Officer Grunts! Before this witness is sworn, just as clarification for the proper procedural steps, since all the defendants are represented by co-counsel, may it be determined now which counsellor will conduct the

cross-examination.

THE COURT: Do you want to make that arrangement now?

MR. MC AULAY: At the present time, I plan to conduct the cross-examination myself.

THE COURT: Proceed.

P A T R O L M A N R A Y M O N D G R U N T Z, having been first duly sworn, by the Court, testified as follows:

THE COURT: Give your name, Shield Number and assignment.

OFFICER GRUNTZ: Patrolman Raymond Gruntz, Shield Number 23220, assigned to the Tenth Precinct.

THE COURT: You are aware, Counseller, that there are two separate counts in this offense complaint?

MR. MC AULAY: Yes, Section 722, Subdivision 3, and 722, Subdivision B.

THE COURT: And the charge of Disorderly Conduct, 722, Subdivision B, that really applies to the presence of an unauthorized person in a Public School, or near a Public School?

MR. MC AULAY: Yes.

BY MR. RYAN:

Q Officer, on May 29th, 1964, at about 1:40 P. M. were you in the vicinity of 351 West 18th Street, in the County of New York?

A I was.

Q And, at about that time, Officer, did you summon or arrest the five defendants in this case?

A I did.

THE COURT: Which did you do?

OFFICER GRUNTZ: I made a summary arrest on the scene and was instructed at the Station House to issue summonses.

Q Officer, at that location, 351 West 18th Street, is that the Charles Evans Hughes High School?

A That is correct.

Q Will you tell the Court, Officer, the facts and circumstances leading up to the arrest?

A At approximately ten minutes after one - 1:00 P. M., I observed a large group coming West on 18th Street. As the group got closer, I approached them--

-5- Pat. Gruntz - For the Peo. - Direct.

THE COURT: Is that 18th Street?

OFFICER GRUNTZ: West 18th Street, between Eighth and Ninth Avenues.

THE COURT: Go ahead.

OFFICER GRUNTZ: I approached the group, as a whole, and I asked - I believe it was the defendant, William Sprowal, what was his purpose to be there in front of the School. He said he planned to distribute literature in front of the School, and I asked him, "What type of literature?". He showed me it was connected with the Core literature.

I then instructed him that it would not be permissible to hand out such literature and that if a demonstration was to start in front of the School, it is a violation of Section 722, Subdivision B, of the Penal Law, of Loitering in front of a School.

Q When you had this conversation with the defendant, Sprowal, where were you in relation to the School?

A I was standing in front of the main entrance to the Charles Evans Hughes High School.

Q Is that main entrance approximately in the center

of the building?

A Approximately in the center of the building.

Q Is this School on the corner?

A It is approximately in the middle of the block.

Q On the North side of the street?

A On the North side.

Q Officer, is there any yard or fence between the School and the sidewalk?

A No, there is not.

Q And approximately how wide is the sidewalk next to the School?

A Approximately ten to twelve feet.

Q And you said he was in front of the entrance; is it the middle entrance when you first had a conversation with the defendant, Sprowal?

A Yes.

Q Will you continue from there on?

A I informed the defendant that he was in violation of Section 722, Subdivision B, in that he had no business in front of the School. I said he could conduct no sort of operation which he

wanted to carry on. I said he can do it out of the School block, either on the corner or by taking another Avenue, not to interfere with the students coming in or out of the School.

THE COURT: How many persons were present when you had this conversation with Mr. Sprowal?

OFFICER GRUNTZ: The School was letting out. It was approximately - there were approximately two hundred and fifty to five hundred students coming out of the School at that particular hour.

THE COURT: Apart from the persons issuing from the School, how many were with Mr. Sprowal?

OFFICER GRUNTZ: I believe four others.

THE COURT: All right, go ahead.

BY MR. RYAN: (CONT'D.)

Q And are those the four other defendants?

A That's right.

Q And will you indicate which of the four other defendants you spoke to and what was said?

A I asked them to please get out of the School

block and Mr. Sprowal flatly refused.

Q What did he say?

A He said, 'I refuse to move out of the block.'. He wanted to hand out his papers.

Q What happened then?

A I informed him if he didn't move out of the block, he was in violation of another Section of the Law in that he would be refusing to do something, when ordered to do so by a Police Officer. He still refused to move and, at this time, I entered the School and called the Tenth Precinct for assistance, at which time, about twenty minutes later, I did get assistance.

I come out on the street again and, by this time, there were about two hundred students gathering around, accepting literature that they were passing out.

I asked them to discontinue handing it out and don't block up the place and get out of the block that they were interfering with the dismissal of the students. At this point, I placed William Sprowal under arrest, for violation of

-9- Pat. Gruntz - For the Peo. - Direct.

Section 722, Subdivision B and 722, Subdivision 3, of the Penal Law.

Q At that time, did you have any conversation with the defendant, Sprowal?

A I did; he said he refused to move out of the block, or something to that effect and he sat down on the street.

Q What happened then?

A I informed him if he didn't get up after being placed under arrest, there would be an additional charge of resisting arrest.

Each of the other defendants started milling around. They wouldn't stay still. I asked Miss Sidellis, the second one sitting there - I asked her to please leave the block. She shook her head, "No".

Then, there was Katherine Abel; when she was asked to leave the block, she shook her head, "No".

Q What did you say to Katherine Abel?

A I told her to leave the block, to go out of the block, and if you want to give a demonstration,

or hand out pamphlets, to take it up to Eighth Avenue or Ninth Avenue. I said, just as long as she stays away from the School.

Q What happened then?

A She refused me; she shook her head with a funny grin as if she didn't understand what I was trying to get across to her.

And then, James Lanier, with the blue suit here, he was handing out slightly smaller pieces of literature. He said he would stick with Mr. Sprowal; he didn't want to leave the block and I then placed him under arrest.

The last one was Stephen Gordon. He was approximately two hundred feet East of the School building. I summoned Patrolman Rohan to call Mr. Gordon to my side. He then brought Mr. Gordon over and I explained to him that he was in violation of Section 722, Subdivision B, of the Penal Law, Loitering, in and around the vicinity of the School building, and he also refused to move. I then placed him under arrest.

Q Officer, referring to the defendant, Gordon, what

-11- Pat. Grunts - For the Peo. - Direct.

was the first time you saw him?

A He appeared in front of the main entrance when I placed each of the other defendants under arrest and he walked away and when I went into the School to make a telephone call--

Q When you went in to make a telephone call, was the defendant, Gordon, in front of the School, at that time?

A Yes.

Q When you returned, was he in front of the School at that time?

A Yes, he was.

Q What happened after you spoke to the defendant, Gordon?

A He refused to move, out of the block. I then placed him under arrest.

Q When you say, "Refused to move out of the block", did he say anything to you?

A He said he refused. He wanted to stick with Mr. Sprowal. At this point, the group as a whole were milling around and due to the pressure of the students coming out of the front door, we were

forced to cross the street, in front of 351 West 18th Street.

By this time, the Tenth Precinct Squad car which had two Detectives had came on the scene and also the Fourteenth Precinct Sector car.

Q Officer, when you first sighted the defendants near the School, were there any other people in the immediate vicinity of where you and the defendants were?

A Approximately, better than one hundred students. They were accepting pamphlets or literature being handed out by the defendants.

THE COURT: Was there an observation of handing them out?

OFFICER GRUNTZ: Oh, yes, there was.

THE COURT: Did you see every one of them handing out pamphlets?

OFFICER GRUNTZ: Yes, I did, your Honor.

Q Officer, at the time you placed the defendants under arrest, approximately how many people were in the vicinity - the immediate vicinity at that time?

-13- Pat. Grunts - For the Peo. - Direct.

A Approximately two hundred students came out of the building. They were milling around the group, as a whole.

Q Officer, how much time elapsed from the time you first sighted the defendant, Sprowal, until the time you placed the defendants under arrest?

A Approximately thirty minutes.

Q Officer, do you have the literature that was being handed out at that time?

A I do. This part of the batch was being distributed by James Lanier, and this part of the batch was being distributed by William Sprowal. I have the initials and their names marked on them.

MR. RYAN: The People offer into evidence, at this time, the smaller pieces of paper against the defendant, Lanier, and the larger pieces against the defendant, Sprowal and ask that they be marked "People's Exhibits 1 and 2, in evidence.".

THE COURT: Any objection?

MR. MC AULAY: No objection.

THE COURT: That is Lanier and Sprowal?

MR. RYAN: That is correct.

THE COURT: What about the other three defendants, what were they doing?

OFFICER GRUNTZ: I could have gotten a piece of paper off everyone of them. This is the two principal boys. They were both handing out some literature, these two boys.

THE COURT: You said you saw all the others handing out something?

OFFICER GRUNTZ: Yes, but just scratch paper, one, a large piece of paper, and one, a small piece of paper.

THE COURT: When you were talking to Sprowal once again, you told him that you thought they ought not to be in the neighborhood of the building because of the requirements of Section 722, Subdivision B; who else were with him?

OFFICER GRUNTZ: The four others were around him, in a semicircle.

Q And it was after your conversation with him, was it, Officer?

THE COURT: I am not asking you to

-15- Pat. Gruntz - For the Peo. - Direct.

reproduce what I say. What I am doing is asking questions.

OFFICER GRUNTZ: Yes, your Honor.

THE COURT: You say that after you spoke to Mr. Sprowal with the others in a semi-circle, that they did distribute the literature?

OFFICER GRUNTZ: No, your Honor, they were distributing the literature as I approached.

THE COURT: Did they stop after you--?

OFFICER GRUNTZ: No, your Honor, after I had them under arrest.

THE COURT: No, after you spoke to Mr. Sprowal, in the presence of the others?

OFFICER GRUNTZ: They never ceased or stopped distributing the literature until I removed it from them.

THE COURT: How much of an interval was there between the time you stopped telling Mr. Sprowal - between the time you told Mr. Sprowal to stop distributing literature, until the time you arrested him and the others?

OFFICER GRUNTZ: Thirty minutes.

THE COURT: Thirty minutes?

OFFICER GRUNTZ: Thirty minutes.

THE COURT: What was happening during those thirty minutes?

OFFICER GRUNTZ: They had all totally disregarded the point that I was making.

THE COURT: No, no; don't give me a conclusion. What, if anything, were they doing, or were they not doing?

OFFICER GRUNTZ: Distributing literature and failed to comply with my orders.

THE COURT: There was an interval of thirty minutes between the conversation you had with Mr. Sprowal, in the presence of the other four defendants, and the time you arrested them?

OFFICER GRUNTZ: Yes.

THE COURT: And, during those thirty minutes, when the students were getting out of the school, they were distributing literature?

OFFICER GRUNTZ: Yes, your Honor.

THE COURT: On the block?

OFFICER GRUNTZ: Yes, your Honor, in front of the entrance.

THE COURT: I wanted to have those things cleared up. Go ahead.

MR. RYAN: I have no further questions of the witness.

THE COURT: Were these marked, were these Exhibits marked, or deemed marked?

MR. RYAN: Deemed marked.

THE COURT: Which one relates to each?

OFFICER GRUNTZ: The small one relates to James Lanier.

THE COURT: Mark them in evidence, People's Exhibits 1 and 2.

(Literature received in evidence and marked "People's Exhibit 1 " and "People's Exhibit 2")

THE COURT: Cross-examine.

BY MR. MC AULAY:

Q After you first spoke to Mr. Sprowal, and the rest of the defendants, you indicated that you went into the building to make a call?

A I did.

Q How much time elapsed between the termination of

the discussion with the defendant, Mr. Sprowal, and the time when you went into the building?

A After I left Mr. Sprowal, I went into the building and made a call immediately on a Public telephone.

Q When did you—

MR. MC AULAY: Withdrawn.

Q How much time elapsed between the time you went into the building and the time you came out of the building?

A Thirty minutes.

Q When you came out of the building, did you see all five defendants?

A I did.

Q Where - did you observe the five defendants distributing literature at that time?

A I did, and I once again, asked them to please step out of the block. I pleaded with them for half an hour, approximately.

Q When you came out of the building, after having made this phone call, where were the five defendants standing? Where was each of the five defend-

ants standing?

A Approximately five feet from the main entrance.

Q Were all five together?

A A couple of them were apart, in a circle, handing out literature to the students coming out of the main entrance.

Q The School is on the North side of the street?

A The North side of West 18th Street.

Q Were they standing on the sidewalk, on the North side of West 18th Street?

A On the sidewalk.

Q --On the North side of West 18th Street, when you came out of the building?

A Yes.

Q Did you go into the building again, after that?

A I went in once to make the telephone call.

Q After you came out, after making one phone call, did you then reenter the building?

A No, I did not. I went to ask a newspaper man who was in the street at the time, to make another phone call for me, but he declined.

Q Did you remain on the street, in that area?

-20- Pat. Grunts - For the Peo. - Cross.

A I remained in front of the main entrance.

Q For how long?

A For approximately another twenty five minutes.

Q During this period of twenty five minutes, were they engaged in distributing literature?

A They were.

Q During this period of twenty five minutes, did any of these five defendants change their location where they were distributing literature?

A A few feet here and there.

Q Did any of them move to the South side of the street?

A Not until after they were under arrest.

Q Did any of them move past the School boundary on the North side of the street?

A One did; that was the defendant, Stephen Gordon, as I stated earlier.

Q And when they moved to that position--?

A I had the three of them under arrest at the time.

Q After you placed the three people under arrest, Gordon had just moved, you say, to another place?

-21- Pat. Gruntz - For the Peo. - Cross.

A Yes, when I had the three under arrest, I happened to glance and he was distributing leaflets approximately fifty feet from the School. That is the first time I noticed that he had left the group, as a whole, when I had made up my mind to place the defendants under arrest, he was in the group.

Q During this period that you observed the defendants distributing literature, were you able to make an estimate of how much literature they distributed?

A Well, when I started, I remember the whole thing in Mr. Sprowal's hand was about five to six inches thick. I don't know how many copies that was - pieces of paper, and each of the other defendants had equivalants.

Q And were you able to make an estimate of how much literature they were distributing?

A I would estimate it was close to four hundred and fifty to five hundred students who left the school during that period.

Q Would you say that each of the defendants were

able to get literature - that literature to all of those students, based entirely on what you observed?

THE COURT: If he can answer it; he is asking for an estimate.

OFFICER GRUNTZ: I stated in my testimony, that they were handing out literature. How many people they reached, I wouldn't venture to guess.

Q You stated that the defendants, or some of them went to the South side of the street, after they were placed under arrest?

A That is correct.

Q Did you request that they go to the South side of the street?

A I wanted them to stand still, but they kept walking away from me. I did not want to use necessary force there and I didn't want to lay my hands on any of them.

Q Did you request them to go to the South side of the street?

A No, I did not. I informed them that I would place them under arrest and I didn't want them

to move after I placed them under arrest.

Q They then went to the South side of the street?

A That is correct.

Q While you were observing the defendants distributing literature, were there any other Police Officers around?

A Approximately twenty minutes after this whole thing started, I got the attention of a Patrolman who was walking up Eighth Avenue and he went up and escorted Mr. Gordon to my side.

Q That was Patrolman Rahan?

A Patrolman Rahan.

MR. MC AULAY: I have no further questions.

MR. RYAN: I have one or two.

BY MR. RYAN: (CONT'D.)

Q How long have you been in the Tenth Precinct?

A Approximately two and a half years.

Q And, during that time, have you ever worked in the block where the School is located?

A That is my post. I work that post for the last two years.

-24- Pat. Gruntz - For the Peo. - Re-Direct.

Q Are there any signs on the School, or next to the School?

A Yes, there is a sign posted.

THE COURT: Where is it posted?

OFFICER GRUNTZ: In front of the entrance - I believe the main entrance there. It is customarily above it on all School buildings.

Q Does that sign refer to the Law?

A I won't quote it word for word, but it says "No Loitering. Persons found loitering in front of the building are subject to the charge of Disorderly Conduct.".

Q Officer, was it after you told each of the defendants that they were under arrest, that they then proceeded to cross to the South side of the street - is that correct?

A Yes, Sir.

MR. RYAN: No further questions.

THE COURT: Will it be stipulated that these defendants are neither the Police, nor friends of pupils enrolled in that School?

MR. MC AULAY: Yes.

-25- Pat. Grunts

THE COURT: And that, of course, they are not students in the School, either?

MR. MC AURAY: That's right.

THE COURT: That is stipulated?

MR. MC AULAY: Yes.

THE COURT: Is there anything else you want of this Officer? Do you want to ask him any more questions?

I ask that in view of the fact that there was some redirect-examination and you are entitled to recross-examination.

MR. MC AULAY: No, I don't think there is.

MR. RYAN: That is the People's case.

THE COURT: Motion? Do you want to make your motions with respect to the five defendants?

MR. MC AULAY: I wish to move to dismiss as to both of the charges and I wish to be given an opportunity here to discuss the motion.

THE COURT: If you are going to sum up, or make any argument on the Law, I would prefer that you do it at the close of the entire case

so I have the complete picture before me.

On the prima facie case, certainly with respect to one count, I deny the motion with respect to each defendant - in fact the motion applies to both counts, at the close of the People's case.

Do you wish to proceed?

MR. MC AULAY: I wish to take a moment, please, to confer.

THE COURT: Take more than a moment and decide what you wish to do.

(Mr. Mc Aulay confers with defendants and co-counsel and case continued thereafter)

MR. MC AULAY: I would like to call the witness, Sprowal, first.

THE COURT: All right.

M R. W I L L I A M S P R O W A L, having been first duly sworn, by the Court, testified as follows:

BY THE COURT:

Q What is your full name?

-27- Deft. Sprowal - Direct.

A William Sprowal.

Q Where do you live?

A 40 Avenue D.

Q What kind of work do you do?

A I work for Core.

THE COURT: All right, Sir.

BY MR. MC AULAY:

Q Mr. Sprowal, were you distributing leaflets - I would like to show you People's Exhibit 2.

(Presenting People's Exhibit 2 to witness)

Do you recognize that?

A Yes, I do.

Q Was this the leaflet you distributed in front of the School that day?

A Yes, it was.

Q You heard the testimony of the Policeman that he approached you as you came down on the North side of 18th Street and requested that you leave the street and not distribute leaflets. Did he speak to you in substantially this fashion?

A Most of it, but not out loud.

MR. RYAN: I object. Defense Counseller

is leading the witness. Consequently the answer--

THE COURT: Strike out that answer. We would rather not have him characterise what the Officer said, to begin with. I think your Counsellor would like to have you to tell us your version of what happened, affirmatively, is that correct?

MR. MC AULAY: Yes.

THE COURT: Tell us what happened.

DEFT. SPROWAL: I entered the block to distribute these two leaflets at this High School. We were met, about in the middle of the block, by a Patrolman.

Q Was it in front of the building--?

MR. RYAN: May I have a clarification, when he says "We", who, "We" means?

THE COURT: Can you tell us who "We" refers to?

DEFT. SPROWAL: There were eight of us, the four who are here and myself.

THE COURT: And three others?

DEFT. SPROWAL: And three others, at first.

THE COURT: Who did you say you met in the middle of the block; was it this same Officer?

DEFT. SPROWAL: Yes.

THE COURT: Go ahead.

DEFT. SPROWAL: He asked me, what did I want in the block. And I told him I wanted to distribute leaflets. He said, "Let me see the leaflets.". I showed them to him and he said, "Some Core stuff.".

And he said, "You can't distribute leaflets here.". I said, "Why not?". He said, "You can't distribute leaflets here.".

So, I spoke to the other four defendants and I sent them across the street. I said, "Go across the street; if anybody is going to be arrested, let it be me.". They went across the street.

Stephen Gordon went up the street, on the side in front of the building, but up the street he distributed leaflets. He went inside the building there and he came back out and started walking up the block—

-30- Deft. Sprowal - Direct.

THE COURT: Who are you talking about now?

DEFT. SPROWAL: The Officer. He went up the block toward Gordon distributing leaflets. He started across the street toward the two girls--

BY MR. MC AULAY: (CONT'D.)

Q Who started across the street?

A The Patrolman. He came to the school and went across the street and was talking to the two girls.

I came back down the street and heard him say to the girls "You are under arrest.". I said, "For what?". He said, "For distributing leaflets.". He said, "If you don't move too, you will be arrested also.".

I told him then you have to arrest me too. He arrested myself; at that time, the defendant, Jimmy Lanier came over and he wanted to know what was going on. He said, "You are under arrest.".

After he placed the four of us under arrest, he called over a Patrolman and he said, "Go up the block and get that one up there, Gordon.".

-31- Deft. Sprowal - Direct.

The Patrolman went up the block and brought Gordon back and he said, "You are under arrest.".

I said, "Tell us what Law we were violating", and, to that, he only said, "We don't want you in the block, distributing leaflets.".

Q You say he said you couldn't distribute leaflets on that block?

MR. RYAN: I object to the form of the question.

THE COURT: Overruled. Do you understand the question?

DEFT. SPROWAL: Yes. He said he didn't want us to distribute leaflets in that block.

Q After he told you this, did you distribute leaflets in front of the school?

A Yes, I did.

Q Were you on the sidewalk, on the North side in front of the School?

A Yes, I was.

Q Were any of the other four defendants with you, distributing leaflets while you were distributing leaflets?

A No, they were not. I was by myself.

Q Did you observe any of the other four defendants distributing leaflets at all?

A Yes, they were.

Q Did you observe any of them distributing leaflets in front of the School on the North side of the street?

A No.

MR. RYAN: Objection.

THE COURT: Overruled.

MR. RYAN: The defense Counsellor continually leads the witness.

THE COURT: Overruled. Your answer is what, with respect to having observed them handing out literature on the School side; did you see them handing out—?

DEFT. SPROWAL: No, Sir, I did not.

THE COURT: Did you see them handing out literature on the other side of the street?

DEFT. SPROWAL: Yes, on the South side and up the block.

THE COURT: Next question!

-33- Deft. Sprowal - Direct.

Q How many leaflets, approximately, would you say were being distributed at the time, would you estimate that?

A I distributed about one hundred and fifty to two hundred leaflets.

Q Does this mean you distributed these one hundred and fifty or two hundred leaflets to one hundred fifty or two hundred students?

A No, I distributed those to about twenty five or thirty students. Some of the students came several times.

THE COURT: You don't have to detail each one of the twenty five students and the one hundred and fifty leaflets. We understand.

Q For approximately what period of time were you distributing leaflets; what was the length of the period of time?

A From the time the Officer first approached me until he came out of the School building and went across the street which was not quite ten minutes before we were placed under arrest.

Q And you were distributing leaflets during those

ten minutes?

A Yes.

Q That is the only time - the only period of time you were distributing leaflets?

A Right.

MR. MC AULAY: I have no more questions.

THE COURT: Cross-examination, please.

BY MR. RYAN:

Q Mr. Sprowal, you were arrested on May 29th, 1964, is that correct?

A Yes, it is.

Q And was that in front of this Charles Evans Hughes High School on 18th Street?

A Yes, it was.

Q At about what time did you arrive at the School that day?

A It was just a little after one.

Q At about what time were you arrested, do you recall?

A No, I don't recall exactly the time, but about that time, we were arrested, was one o'clock, I think, or that is when he left to make the call

to get the car to take us down. I was taken from the front of the School.

Q Did you have pamphlets on you, that you later on distributed in front of the School?

A Yes, I did.

Q And were these other four defendants with you at the time?

A Yes, they were.

Q Did they have pamphlets?

A Yes, they did.

Q They had pamphlets also?

A Yes.

Q Now, did you distribute your pamphlets in front of the middle entrance of the School?

A I distributed my leaflets on the side of the School entrance.

Q The side of the School entrance?

A Yes.

Q Is that on the North side of 18th Street?

A That is on the North side of 18th Street.

Q Is that near the center entrance?

A On the side of the door.

-36- Deft. Sprowal - Cross.

Q Which door?

A On the West side, Sir.

Q And how long were you distributing the leaflets before you were arrested?

A Well, before - I distributed the leaflets for about ten minutes and then I started out of the place. I was not the first one arrested.

Q When was the first time--

MR. RYAN: Withdrawn.

Q Did this Officer have a conversation with you in front of the School?

A Yes, when we first approached the School.

Q And did he tell you, at that time, that you couldn't distribute the leaflets or loiter about any part of the School?

A He did not say that. He said, "You can't distribute the leaflets in this block.".

Q And, at that time, you commenced distributing the leaflets?

A Yes.

Q And you distributed it for about ten minutes?

A Yes.

-37- Deft. Sprowal - Cross.

Q Did there come a time after that ten minutes that the Officer went into the School?

A Yes, he did.

Q And did he return?

A Yes, he did.

Q Approximately how much time elapsed there from the time he left until the time he came back?

A No more than ten minutes.

Q And, after he came back, was it after he came out that he arrested you?

A No, it wasn't - it was after he came back I was arrested, but there were other things that happened first.

Q Did there come a time when this Officer - after this Officer had a conversation with you - that you sat on the ground?

A No, I did not.

Q Did there come a time, at any time, before you were arrested, that you sat on the sidewalk, or any portion of the steps or stoop of the School?

A No, not at the School where I sat down, but on the empty lot. After he told me I was arrested

-38- Deft. Sprowal - Cross.

and, waiting for the Patrol wagon, I sat on the lot.

THE COURT: Where is the lot with reference to the School?

DEFT. SPROWAL: It is approximately in front of the School.

THE COURT: On the same side?

DEFT. SPROWAL: On the South side.

THE COURT: On the other side of the street?

DEFT. SPROWAL: Yes, Sir.

BY MR. RYAN: (CONT'G.)

Q When you were distributing leaflets, in front of the School, was it your testimony that none of the other defendants were in front of the School distributing leaflets?

A Absolutely not. Before we left the area--

Q Just answer the question: At any time did you see any of the other four defendants here, distributing leaflets in front of the School?

A Absolutely not.

Q Did you ever hear the Officer speaking to any of

-39- Deft. Sprowal - Cross.

the other four defendants?

A After we were arrested.

Q Did you ever--

A He spoke to me. I was the spokesman for the group.

Q Did you ever hear this Officer tell any of these four defendants that they couldn't loiter in front of the School?

A When he came across the street, he was telling the girls they were under arrest.

Q Did you ever hear the Officer tell the defendants they couldn't distribute leaflets in front of the School?

A As I said before, he told me--

Q Just answer the question! Did you ever hear him tell the other defendants--?

A No, I did not.

Q At the time you worked in front of the School, were any of the students in the immediate vicinity?

A When we first arrived, there was not.

Q How about the time you were arrested, were any of the students in the immediate vicinity?

-40- Deft. Sprowal - Cross.

A Yes, there were.

Q Approximately how many would you say?

A I would say about forty five or fifty.

Q When you were questioned later on and asked what your employment was, did you tell the Officer that you worked for Core?

A No, Sir, I was a bookbinder.

Q Have you ever been convicted of any crime?

MR. MC AULAY: I object.

THE COURT: Overruled.

A Yes.

MR. MC AULAY: I don't see the relevance.

THE COURT: Credibility.

MR. MC AULAY: Your Honor, I believe conviction of a crime, showing Moral Turpitude, would effect credibility.

THE COURT: Conviction of any crime would be some reflection or would have some significance with respect to credibility. The kind of conviction might be important in determing what weight you would ascribe to the credibility. Answer the question.

-41- Deft. Sprowal - Cross.

Q Have you ever been convicted of any crime?

A Yes, I have.

Q How many times have you been convicted of a crime?

A How many times I have been convicted of a crime?

Q Yes.

A About six times.

MR. RYAN: No further questions.

DEFT. SPROWAL: The question was "Arrested"?

THE COURT: No, no.

BY MR. MC AULAY:

Q Mr. Sprowal, concerning the six crimes that you testified that you were convicted of, would you tell the Court, one by one, what they were and when they occurred?

A Yes, last month I was arrested two other times.

THE COURT: I don't want any arrests. No arrests, just convictions.

DEFT. SPROWAL: Then I was only convicted three times.

THE COURT: All right, three times.

-42- Deft. Sprowal - Re-Direct.

DEFT. SPROWAL: Last summer, I was convicted, that's all.

MR. RYAN: I object to the answer.

THE COURT: Wait a minute. We are entitled to know and if Counsellor wants to bring it out, we are entitled to know what the specific crime was.

DEFT. SPROWAL: Yes, it was for distributing, protesting and for disorderliness in the construction site.

THE COURT: What was the crime?

DEFT. SPROWAL: Disorderly Conduct.

THE COURT: That is not a crime. We will strike that out. I will take no cognizance of that conviction. Disorderly Conduct is not a crime.

DEFT. SPROWAL: I was picked up once for Suspicious Person.

THE COURT: No, no; I don't want information as to your having been picked up. We want, clearly and specifically, only crimes that you might have been convicted of. Other-

-43- Deft. Sprowal - Re-Direct.

wise, nothing else.

DEFT. SPROWAL: Those are the two I have been arrested for.

THE COURT: In other words, you have never been convicted of a crime?

DEFT. SPROWAL: Of this sort?

THE COURT: Do you want to consult with your lawyer?

DEFT. SPROWAL: Yes.

(Defendant Sprowal and Mr. Mc Aulay confer)

THE COURT: Now that Counseller has consulted with his client, does Counseller wish to ask him any questions?

BY MR. MC AULAY: (CONT'D.)

Q I would like to ask you a question: Specifically, as you now understand it, have you ever been convicted of a crime?

A No, Sir.

MR. MC AULAY: I have no further questions.

MR. RYAN: I have no further questions.

THE COURT: Now, I have to move some

other cases; we always have arraignments and dispositions. Can you give me some idea of how long you will take? I don't say this for the purpose of curtailing your case. If it is necessary, we will put it over and finish it tomorrow.

But, there are certain matters such as arraignments that I must take care of and the disposition of a case where I assigned a Counsel.

MR. MC AULAY: In estimating the time I will take to examine each of the remaining witnesses, I think, an average of about three minutes, maybe a little longer with Mr. Lanier. And then I have an extensive statement to make.

THE COURT: We will probably have to defer that statement until I take a little time to dispose of these other matters. Let's take fifteen minutes more and see what we can do.

MR. MC AULAY: I would like to have Mr. Lanier take the stand.

M R. J A M E S L A N I E R (DEFENDANT)

-45- Deft. Lanier - Direct.

having been first duly sworn, by the Court, testified as follows:

BY THE COURT:

Q What is your full name?

A James Lanier.

Q Where do you live?

A Box 248, Olster Park, New York, R. D. I.

Q What kind of work do you do?

A Teacher.

Q What do you teach?

A Graphic Arts.

THE COURT: All right, go ahead.

BY MR. MC AULAY:

Q Mr. Lanier, when you were distributing leaflets, at the time, will you tell the Court where you were distributing the leaflets?

A Yes, we were on 18th Street, on the South side of the street, directly across from the School.

Q What kind of a building or structure were you standing in front of?

A In the immediate vicinity - it was a vacant lot.

-46- Deft. Lanier - Direct.

Q I show you Exhibit Number 1; do you recognize this?

A Yes.

Q Was this the leaflet you were distributing?

A Yes.

Q When, - approximately what period of time were you distributing the literature?

A No more than ten minutes.

Q How many piece of literature would you say you were distributing?

A Between twenty five and fifty. It could not have been more because I didn't have that many.

Q How many students were they distributed to?

A Maybe twenty five or thirty students.

Q Did you observe the rest of the defendants distributing literature?

A Yes, I did.

Q Could you, just quickly, briefly, tell us where each of the other defendants were located when you were distributing literature?

A Yes, Marianthe Sidellis and Katherine Abel were to the West of me, on the same South side of

18th Street, in front of the vacant lot.
We had to move constantly to walk to the students as they were coming out of the building. They were crossing the street and going in opposite directions. Some were going West, some South, and some were crossing directly across.

Q Did you observe Stephen Gordon distributing literature?

A He was all the way up, on the same side of the School. He was out a great distance from the School. He was about two-thirds of the way between the School building and the Eighth Avenue corner of 18th Street.

Q And did you discuss with Sprowal, the distributing of the literature?

A Yes.

Q Where was he located?

A At one point, he was directly across from us, on the same side of the School building, on the sidewalk, toward the edge of the gutter.

Q Distributing literature?

A Yes, at one point. He then crossed to the

other side and went up to Stephen Gordon, at one point--

MR. MC AULAY: Just a moment.

MR. RYAN: I respectfully submit he should be allowed to continue.

THE COURT: Yes, continue.

DEFT. LANIER: Mr. Sprowal went to Stephen Gordon and he returned at the time that the actual arrests were being made.

Q Were you directed to distribute any literature that you were handing out to the students leaving the School?

A Yes, we were.

Q Why didn't you distribute the literature all at the same location?

A Well, we - it was almost impossible to distribute the literature anywhere else than in front of the School because lots of the students start to fan out. You can't get to them. You have to run back and forth. This way, as they were coming out, fanning in different directions, one would be - they were supposed to be moving and we were merely

attempting to get the literature into their hands without anybody being disturbed.

MR. RYAN: Your Honor, I object to that.

THE COURT: I will allow it. It is an opinion, but I will allow it.

Q At the time that you were distributing the literature, just prior to your arrest, immediately prior to your arrest, approximately how many students were in the area immediately around you?

A I think there were no more than perhaps fifty. They had just begun to come out.

Q Do you know how wide the sidewalk is on the other side of the street?

A Yes, it is about twelve feet.

MR. MC AULAY: Thank you, no more questions.

THE COURT: Do I understand your testimony to be, with respect to who was on what side, that Mr. Gordon and Mr. Sprowal were on the North side - that is the School side - never mind the distance from the main entrance - and the two girls and you were on the South side?

-5C- Deft. Lanier - Cross.

DEFT. LANIER: That's right.

THE COURT: You are talking about the time the literature was being distributed?

DEFT. LANIER: That is correct. May I tell you one thing?

THE COURT: No, no. Don't tell me anything without your Counsel telling you to, because you may be saying the wrong thing.

Cross-examine.

BY MR. RYAN:

Q Sir, you say you are a Teacher of Graphic Arts?

A Yes.

Q Do you work for the Public School system?

A No.

Q A Private School?

A Yes.

Q What School do you work for?

A Pratt Institute.

THE COURT: That is a very well-known center of Engineering study?

DEFT. LANIER: Yes, Engineering or Design.

BY MR. RYAN: (CONT'D.)

-51- Deft. Lanier - Cross.

Q Sir, you were arrested on 18th Street, on May 29th, 1964, is that correct?

A That is correct.

Q And was that about 1:40, 1:50 in the afternoon?

A The exact time, I am not sure of; I believe that that is correct.

Q And what time did you arrive there that afternoon, on 18th Street?

A I am not even sure of that.

Q Did you arrive there about the time of letting-out of School?

A Actually, I did not think of it.

Q But that would have been logical?

A Yes.

Q Pardon?

A That would have been a logical thing to do.

Q What? Did you know that the School let-out at that particular time?

A No, I did not know that.

Q Sir, you say that you observed the defendant, Sprowal, in front of the School, handing out literature, is that correct?

-52- Deft. Lanier - Cross.

A Yes.

Q Where in front of the School was he?

A He would be - I can't point to it —

Q Tell me, in your own words—?

A We have a diagram here.

THE COURT: You have a diagram which indicates your respective positions, is that what you say?

DEFT. LANIER: Yes.

THE COURT: When was this diagram made?

DEFT. LANIER: We got together and made it.

THE COURT: Do you want to introduce the diagram?

MR. RYAN: I have no objection.

MR. MC AULAY: I think it would help, wouldn't it?

THE COURT: No, I cannot advise you and I cannot tell you how to prove your case. Your client feels that something that illustrates that situation graphically, may be better.

MR. MC AULAY: I think it may be usefel to the Court.

-53- Deft. Lanier - Cross.

MR. RYAN: I object.

THE COURT: Objection sustained. He doesn't want to agree to its introduction because he doesn't have to.

BY MR. RYAN: (CONT'G.)

Q Where was the defendant Sprowal, in front of the School, when he was handing out the literature and pamphlets?

A There is an entrance door - the first one that you arrive at, as you come down - as you come West on 18th Street and there was a "No Parking" stanchion by the curb and that is where he was standing, by the curb in front.

Q The East end entrance?

A The East end entrance, yes.

Q And at that time, the defendant Gordon was also on the North side of the street?

A Yes.

Q Was he at the West end entrance?

A No, no, he was--

Q Was he in the middle of the School?

A No.

-54- Deft. Lanier - Cross.

Q You say in order to reach the students, you had to walk to the students to give them the literature, is that correct?

A Yes.

Q And, in doing so, did you not walk over to the North side of the street to hand them literature?

A To the North side? No, not at that time.

Q Was there any great crowd of students coming to this vacant lot on the South side of the street?

A Great crowd, no.

Q When you first arrived in the area, were there any other people in the immediate vicinity?

A No.

Q How about the time you were arrested, Sir, were there any other people in the immediate area?

A Yes.

Q Approximately how many?

A I would say no more than ten or fifteen, including the fourof us.

Q Sir, when you first--

MR. RYAN: Withdrawn.

Q You say, ten or fifteen, including yourself?

-55- Deft. Lanier - Cross.

A Yes.

Q Well, Sir, before, on direct-examination, didn't you say about fifty people?

A Not all in one group, as they were coming in various directions.

Q Sir, when you first came into 18th Street, did you immediately start handing out the pieces of paper and pamphlets?

A No, I didn't.

Q Was that because the School didn't let-out en masse, yet?

A There weren't any people.

Q But, later on, the School let-out, is that correct?

A I would say that I think some classes let-out, yes.

Q Now, Sir, when you first started handing out the pamphlets, did this Arresting Officer say anything to you?

A Yes.

Q And you were in the street, on 18th Street, before he said anything to you, is that correct?

A Yes.

-56- Deft. Lanier - Cross.

Q Approximately how much time had elapsed before the Officer spoke to you?

A He spoke to us immediately upon our approaching the School with the - standing there with the literature.

Q Was that on the North side of the street?

A On the North side of the street.

Q That is where you were, on the North side?

A Yes.

Q With Mr. Sprowal?

A That's right.

Q And the other defendants?

A That is correct.

Q And, after he spoke to you, did you hand out any literature?

A After we crossed the street?

THE COURT: I am not sure what he means. When the Officer first spoke to you, were you on the North side of the street?

DEFT. LANIER: Yes, we were; we all walked down together.

THE COURT: You were on the North side

-57- Deft. Lanier - Cross.

of the street?

DEFT. LANIER: Yes.

THE COURT: You say, prior to his speaking to you, you hadn't distributed any literature on the North side?

DEFT. LANIER: No.

THE COURT: Not at all?

DEFT. LANIER: No, not at all.

THE COURT: And when he spoke to you - er, you spoke to him, you crossed to the South side?

DEFT. LANIER: Yes, Sir, to the South side.

THE COURT: Where was he while you were crossing?

DEFT. LANIER: The Officer was first standing by the stanchion.

THE COURT: On the North side?

DEFT. LANIER: On the curb. Then he said to a man - I don't know who he was - I think it was a Reporter - about making a call. Then he went into the School building.

THE COURT: Who, the Officer?

-58- Deft. Lanier - Cross.

DEFT. LANIER: The Officer. He went into the School building. We were on the South side giving out literature when he came back out again.

THE COURT: Well, did you hear him tell the Reporter "I had better make that call."?

DEFT. LANIER: Yes.

BY MR. RYAN: (CONT'D.)

Q Were you on the North side at that time?

A No, let us see: I think - as far as I remember, I was crossing the street.

THE COURT: All right, go on.

Q How far away were you from the Officer when you heard him say that?

A Quite near. I would say, ten or fifteen feet.

Q And you say you could hear him say this to the Reporter?

A Yes.

Q Sir, isn't it a fact that you moved to the South side of the street after the Officer told you you were under arrest?

A No, that is not true.

-59- Deft. Lanier - Cross.

Q How much time elapsed from the time the Officer first spoke to you until the time he placed you under arrest?

A I would say it was about ten minutes.

MR. RYAN: I have no further questions.

THE COURT: Thank you.

MR. MC AULAY: One question, if I may?

BY MR. MC AULAY:

Q Mr. Lanier, when the Officer came across the street, towards you, and the two other defendants who were there distributing literature, did he say anything to you?

A Yes, he said to move on. Then he told Katherine Abel and Miss Sidellis to move on or they would be placed under arrest, whereupon they began to move West, obeying his orders. They didn't want to get arrested.

MR. RYAN: I object to the answer as not responsive, "They began to move West".

THE COURT: I will allow it.

DEFT. LANIER: He called them back when they were ten to fifteen feet away from the Police

-60- Deft. Lanier - Re-Direct.

Officer, on the South side of the street.

They were complying with his order at that time.

MR. RYAN: Objection to the characterization.

THE COURT: Yes, sustained. Strike out, "Complying with his order", I believe.",

DEFT. LANIER: And he called them back and placed them under arrest and I objected. I asked why they were being arrested? I said, "Tell them why". And he said, "It is my word against yours.".

Q Had he placed you under arrest at that time?

A Yes.

Q You objected to the Officer placing them under arrest?

A Yes.

Q What did you say?

A I said they were obeying the Officer, moving where he said they should move and he said, "It is my word against yours.".

Q They were placed under arrest?

A Not only they, but Mr. Sprowal was placed

under arrest.

Q That was subsequent to that conversation?

A Yes.

MR. MC AULAY: No further questions.

BY MR. RYAN:

Q You were placed under arrest, after the defendant, Sprowal?

A Yes.

Q And were the girls placed under arrest after the defendant, Sprowal?

A No, they were first.

MR. RYAN: No further questions.

THE COURT: We will have to arrange for an adjournment. I assume that I will be in the building the next two weeks. I don't know about tomorrow. Is tomorrow all right?

MR. MC AULAY: Yes, I should think that tomorrow was all right, yes.

THE COURT: All right, we will put it down for tomorrow and I will try to arrange it. How long will it be - another half an hour - another hour?

MR. MC AULAY: For my summation, much less than that.

THE COURT: Your summary?

MR. MC AULAY: My summary.

THE COURT: This case is adjourned until two o'clock, tomorrow afternoon, before me.

It will be either in this Courtroom or some other Courtroom but you come here and then I will advise you. (Addressing Defendants) You are under parole?

MR. MC AULAY: Yes.

THE COURT: Continued trial for tomorrow.

! !

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF MINUTES IN CASE OF PEOPLE VERSUS DEFENDANTS ABEL, GORDON, SPROWAL, LANIER AND SIDELLIS.

F. WEINBERG
COURT REPORTER

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CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK : PART 3

THE PEOPLE OF THE STATE OF NEW YORK	:	Docket Nos. Y2289
	:	Y11353 through Y11356
against	:	
	:	Charges: 722.3
	:	722.b
MARY ANN SIDERELIS, KATHRYN ABEL,	:	
STEVEN W. GORDON, WILLIAM SPROWAL,	:	Trial
and JAMES LANIER,	:	
Defendants	:	September 4, 1964
	:	

B E F O R E : H O N. R E U B E N L E V Y,

Presiding Judge

APPEARANCES :

GERALD J. RYAN, Assistant District Attorney, 155 Leonard Street, New York, New York, for the People.

LLOYD MCCAULAY, Attorney at Law, 165 Broadway, New York, New York, and

JOSEPH ROSENSWEIG, Attorney at Law, for the defendants.

Joseph Walton,
Court Officer

Alejandro Gonzalez,
Official Court Reporter

2.

I N D E X

	DIRECT	CROSS	REDIRECT	RECROSS
MARY ANN SIDERELIS	4	11		
KATHRYN ABEL	19	24		
STEVEN W. GORDON	30	39		
RICHARD HIGMAN	43			

3. BRIDGE OFFICER: Calendar 41. This is a continued trial. Dockets Number Y2289, Mary Ann Siderelis, Y11353 through Y11356, Kathryn Abel, Steven W. Gordon, William Sprowal, and James Lanier, all charged with Disorderly Conduct, Section 722, subdivision (b) and 3 of Penal Law.

Defendants are all represented by Lloyd McCaulay, 165 Broadway.

DEFENSE COUNSEL: Lloyd McCaulay, 165 Broadway, attorney for all defendants, Joseph Rosensweig of counsel.

THE COURT: Does the Defense wish to call any other witnesses?

DEFENSE COUNSEL: Yes. I would like to call Mary Ann Siderelis, and Joseph Rosensweig will conduct the examination.

DISTRICT ATTORNEY: Your Honor, is Mr. Rosensweig going to conduct all examinations?

THE COURT: To cut it short, I don't see any objection to separate counsel conducting an examination of separate witnesses; but I don't think two counsel ought to conduct

4. Siderelis - For the Defendants - Direct

an examination as to any one witness.

DEFENSE COUNSEL: We will follow that.

THE COURT: All right. Make it as liberal as you want. Are you satisfied with that?

MARY ANN SIDERELIS, was called as a witness on behalf of the Defendants, and after having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENSWEIG:

THE COURT: Sit down, please.

BRIDGE OFFICER: Please give your name, address, and occupation.

THE WITNESS: Mary Ann Siderelis.

THE COURT: All right, where do you live?

THE WITNESS: 228 East Third Street.

THE COURT: That is in Manhattan?

THE WITNESS: Yes.

THE COURT: What kind of work do you do?

THE WITNESS: I work for CORE.

THE COURT: All right.

Q Miss Siderelis, going back to May 29, on that day, were you in the vicinity of Charles Evans Hughes High School, at 18th Street in Manhattan?

A Yes.

Q Will you tell the Court the circumstances of your presence there?

THE COURT: Try to talk loud; this is a big room and we need pretty good volume for communication. All right.

A I had gone down to Charles Evans Hughes High School to distribute some leaflets for CORE.

THE COURT: Well, go on.

Q Will you tell the Court what happened when you went down there?

THE COURT: Well, let's see. About what time did you get there?

THE WITNESS: It was early in the afternoon. I am not sure of the time.

THE COURT: Well, the location of the school has already been fixed. It is on the north side of West 18th Street, between Eighth

6. Siderelis - For the Defendants - Direct and Ninth.

THE WITNESS: That is correct.

THE COURT: Tell us what happened from the time you entered the block, where you entered, how you entered, who was with you. Give us all the details you can.

THE WITNESS: There were eight people with us, and we walked down towards Ninth Avenue, on 18th Street.

THE COURT: On what side of the street?

THE WITNESS: The north side.

THE COURT: That is where the school is.

THE WITNESS: And as we got to the main entrance, we saw the patrolman and another man who I am pretty sure was a reporter; and he told us that we could not distribute leaflets.

When he said this, we immediately, four of us, crossed over to the other side of the street.

THE COURT: Which four?

7. Siderelis - For the Defendants - Direct

THE WITNESS: Katy, Steve, and Jim.

THE COURT: Give us the last names.

THE WITNESS: Katy Abel, Steven Gordon, and Jim Lanier, and myself. We were the only ones who were distributing the leaflets.

So, we crossed to the other side.

THE COURT: When the officer, as you say, told you you could not distribute the leaflets on the school side -- we'll refer to it as the school side -- you say you, Miss Abel, Mr. Gordon, and Mr. Lanier went over to the other side?

THE WITNESS: That's right.

THE COURT: All right, tell us what happened from then on.

THE WITNESS: Well, we walked up and down the block. Well, not up and down, but we moved around on the other side of the -- on the south side, distributing leaflets to whoever passed

by.

THE COURT: Yes.

THE WITNESS: And, well, the patrolman went inside the building, and as soon as he came out he crossed to the side and told Katy and myself that we had better move on or else we would be under arrest.

So, I looked at Katy, and then we started walking towards Eighth Avenue; and he called us back, and he said, "You are under arrest."

Then he took the leaflets from us, and we stayed there.

Q I show you this leaflet, and ask you whether this is the leaflet you were distributing at the time.

A Yes.

THE COURT: This is People's Exhibit 2.

A Yes, this is the one.

Q Did you, while you were distributing leaflets, observe the location of the other defendants?

A Yes, I did.

Q Where was Mr. Sprowal standing?

9. Siderelis - For the Defendants - Direct

A Well, Chris was first in front of the school, right by the entrance, and he then walked up the block, towards Eighth Avenue, to Steve.

THE COURT: You better give us the second names.

THE WITNESS: To Mr. Gordon.

THE COURT: Yes, do it that way. All right.

Q Was Mr. Sprowal distributing leaflets in front of the school?

A Yes, he was.

Q Approximately where was he in relation to the entrance to the school?

A He was on the -- well, he was moving back and forth, but I remember seeing him on the east side of the entrance.

THE COURT: When you say "east side," what do you take as your stable point then, east of what?

THE WITNESS: Well, he was on the Eighth Avenue side of the entrance.

THE COURT: All right. The

10. Siderelis - For the Defendants - Direct

school entrance. She saw him east of the school entrance. That is what she said.

THE COURT: You can cross-examine.

Q Did you see Mr. Gordon distributing leaflets?

A Yes, I did.

Q Where was he?

A He was almost about two thirds up the block, towards Eighth Avenue.

THE COURT: That would be on the north side of the street?

THE WITNESS: That's right.

Q Approximately how far from the school would that be?

A Oh, my goodness.

THE COURT: When you say, "school," you mean school entrance, building, or what?

DEFENSE COUNSEL: The school building, the east end of the school.

A I can't really judge. I don't remember how far the school building went.

Q Did you say Mr. Lanier was distributing leaflets?

A Yes.

Q Where was he?

A He was distributing leaflets on the south side of the street, west of myself.

Q And did you see where Miss Abel was distributing leaflets?

A Yes, we walked pretty close together, which was on the south side of the street.

Q Did you observe anyone, other than Mr. Sprowal, distributing leaflets in front of the school building?

A No, there wasn't anybody else there distributing them.

DEFENSE COUNSEL: No further questions.

CROSS - EXAMINATION

BY MR. RYAN:

Q When you first arrived in front of the school, you say you were on the north side of the school, off 18th Street?

A That's right.

Q And how much time elapsedbefore you saw this police officer who testified yesterday?

A Oh, we saw him as we were walking down the block, towards the school entrance.

12. Siderelis - For the Defendants - Cross

Q And did you have a conversation with him, or did he speak to the group when you got in front of the school?

A I guess he really addressed Mr. Sprowal, who was at the head of the group.

Q At the time he was talking to Mr. Sprowal, where were you in relation to Mr. Sprowal?

A I believe I was behind him.

Q And how far behind him would you say you were?

A Maybe a foot.

Q And did you hear the officer speaking to Mr. Sprowal?

A Yes, I did.

Q Did you hear what the officer said?

A What I remember was --

Q No, just answer my question. Did you hear what he said?

A I heard him talking. Yes, I heard what he said.

Q Now, what time did you arrive in front of the school?

A I am not quite sure on the time. I know it was early in the afternoon.

13. Siderelis - For the Defendants - Cross

Q At approximately what time?

A I am sorry. I don't remember.

THE COURT: She said on direct the early afternoon. Go ahead, she does not remember.

Q And approximately how long did the officer speak to Mr. Sprowal and yourself?

A Oh, not over two minutes. I am sure.

Q And after that you say the officer entered the school building?

A Yes.

Q And did you see the officer come out of the school building?

A Yes, I did. I was across the street by that time.

Q Approximately how much time elapsed from the time he entered the building until the time he came out?

A About three minutes.

Q Now, during this time, did Mr. Sprowal remain in front of the school?

A He was in front of the school, and he also walked up the block. I am not quite sure what the

14. Siderelis - For the Defendants - Cross

sequence was, how much time elapsed.

Q And did the officer stop your group in front of the middle entrance to the school?

A Well, when we first walked down the street, yes, maybe a little bit.

Q And Mr. Sprowal was on the north side of the street?

A Yes.

Q And you say he moved from the middle entrance to either side?

A And then up the block.

Q And during that time he was handing out leaflets; is that correct?

A Yes, part of it, sure.

Q And when the officer first spoke to Mr. Sprowal, did the officer tell him that he could not loiter about the school and hand out leaflets?

A What I remember the officer saying was that we cannot distribute leaflets here.

Q Now, after the officer came out of the school, how much time elapsed before you were placed under arrest?

15. Siderelis - For the Defendants - Cross

A Not over a couple of minutes.

Q So it is your testimony that after you arrived on the scene, or when you arrived at the scene the officer spoke to you for about two minutes, went into the school for three minutes, and came out and arrested you a few minutes later; is that correct?

A Well, yes, about that. It was not over ten minutes before I was arrested.

Q During the time you were on the south side of 18th Street, did you see Mr. Gordon?

A When I was on the south side? Yes.

Q Was he on the north side of the street?

A Yes, he was.

Q At any time did you see him in the vicinity of Charles Evans Hughes High School?

A Well, he was down almost at the corner of Eighth Avenue.

Q Did you ever see him in front of the school?

A No.

Q At no time, you say?

A Well, except when we walked down the street, in the beginning.

16. Siderelis - For the Defendants - Cross

Q Did he hand out any leaflets in front of the school?

A No, we didn't get a chance.

Q No, did he, Mr. Gordon?

A No.

Q Now, did you remain directly -- opposite the school, on the south side of the street before you were arrested?

A Before I was arrested, I believe I was right across the street.

Q And of the other defendants in this case, which ones were on the opposite side of the school, on the south side of the street?

A Katy was with myself. Miss Abel was with me.

Q And was Mr. Lanier there?

A He was down a little bit from us.

THE COURT: On the same side?

THE WITNESS: On the same side of the street, yes.

Q And was he also opposite the school?'

A I think he was past the entrance, on the other side of the street, down much further.

17. Siderelis - For the Defendants - Cross

Q And during the time that you were on the south side of the street, did you hand out leaflets?

A Yes, I did.

Q Approximately how many leaflets did you hand out?

A Not over ten.

Q Did you see Mr. Lanier hand out any leaflets?

A I was not watching him all the time. I believe I saw him hand one out.

Q Did you hear Mr. Lanier say on the stand, on direct examination yesterday that in handing out leaflets he moved about?

A That's right.

Q And he moved towards the students?

A That's right.

Q Did you see Mr. Lanier leave the south side of the street during the time he was handing out the leaflets?

A No.

Q Is it your testimony that at no time he moved towards the school to hand out the leaflets?

A No, he wouldn't have to to reach the students.

18. Siderelis - For the Defendants - Cross

Q Just answer my questions. Is it your testimony that at no time did he move towards the school to hand out the leaflets?

A No, he didn't.

Q Have you ever been convicted of a crime?

A No.

Q And do you recall the officer having a conversation with you after you were placed under arrest?

A No, he just told me to give him the leaflets. Then he took them from me.

Q Did the officer ever ask you your occupation?

A No, I don't believe he did.

Q Did you ever tell the officer that you worked for CORE?

A No.

Q Did you ever tell the officer that you were a student?

A At the station I believe I did.

Q Are you a student?

A I was. I was enrolled at Hunter for this semester.

DISTRICT ATTORNEY: I have no further

19. Siderelis - For the Defendants - Cross

questions of this witness.

THE COURT: All right, thank you. Step down. Next witness.

KATHRYN ABEL, was called as a witness for the Defendants, and after having first been duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENSWEIG:

THE COURT: What is your name?

THE WITNESS: Kathryn Abel.

THE COURT: Where do you live?

THE WITNESS: 26 Summit Avenue, Larchmont, New York.

THE COURT: Do you go to school or work?

THE WITNESS: I am in between high school and college.

THE COURT: All right.

Q Miss Abel, on May 29, 1964, were you in the vicinity of Charles Evans Hughes High School?

A Yes.

Q Will you please tell the Court the circumstances

20. Abel - For the Defendants - Direct

surrounding the arrest and what happened there?

A Ten of us went there; five of us were distributing leaflets for CORE. As we started coming down the street we saw a policeman and a man who has been identified as a reporter standing outside the front entrance of the school.

THE COURT: Is this after you had begun to distribute leaflets?

THE WITNESS: We were just walking down the street. I may have handed out one or two. I am not even sure.

A As we were coming down the street, the policeman met us in front of the school, and told us -- he addressed himself to Mr. Sprowal, and said that we could not hand out leaflets there. Then Mr. Sprowal told the other four defendants to go across the street, because he didn't want anybody else involved in an arrest. Then three of us crossed the street, and Mr. Gordon started walking up the street, and the policeman --

THE COURT: By up the street you mean on the north side of the street, the school side?

THE WITNESS: Yes.

A And as we were crossing the street, I think it was about that time the policeman entered the school and --

DISTRICT ATTORNEY: I object to what the witness thinks, Your Honor, unless she knows.

A He did enter the school. I am not sure exactly at what instant. And three of us were on the south side of the street, and Mr. Sprowal was in front of the school handing out leaflets, and Mr. Gordon was down the street.

Then Mr. Sprowal started going towards Mr. Gordon, and then the policeman came out of the school. He crossed the street. He came over to us, at the south side, and he told us that if we didn't move on he would place us under arrest. Then we -- I started walking. Miss Siderelis and I started walking. At this point I think Mr. Sprowal saw what was happening, and he started to come across the street, towards -- from Mr. Gordon to us, and we started walking towards him. Then the policeman called us back and said, "Come

22. Abel - For the Defendants - Direct

"back. You are under arrest."

Q While you were standing across the street, the south side, did you hand out any leaflets?

A Yes.

Q I show you this leaflet, a copy of Exhibit 2, and ask you, is this the leaflet you were distributing?

A Yes, it was.

Q Approximately how many of these leaflets did you have occasion to distribute?

A Five to ten, I would say.

Q Approximately how long were you -- for how long a time were you distributing leaflets prior to being placed under arrest?

A It could have been anywhere from five to ten minutes. No, I don't think it was ten minutes. I was probably about five minutes.

Q Did you distribute any leaflets in front of the school, on the north side of the street?

A No, I did not.

Q Did you have occasion to see where the other defendants were handing out the leaflets?

A Yes, I did.

23. Abel - For the Defendants - Direct

Q Where was Miss Siderelis handing out the leaflets?

A She was with me, on the south side of the street.

Q Did she ever distribute leaflets on the north side of the street?

A I know that nobody distributed leaflets there after the policeman told us we shouldn't, except for—I mean, the three of us who crossed the street I know didn't distribute any after we were told we could not distribute them there. I don't know if anybody handed any out as we were walking up.

Q The three of you on the south side, that was yourself, Miss Siderelis, and Mr. Lanier?

A Yes.

Q Did you see Mr. Sprowal distributing any leaflets in front of the school?

A Yes, he did.

Q Did you see Mr. Gordon hand out the leaflets?

A He walked down the street, and I did not see him. As a matter of fact, somebody told me he was down there. He started to walk down. I don't know where he was.

24. Abel - For the Defendants - Cross

DEFENSE COUNSEL: No further questions.

CROSS - EXAMINATION

BY MR. RYAN:

Q Have you discussed your testimony in this case since yesterday, with either defense counsel in this case?

A Since yesterday?

Q Yes.

A No.

Q What time did you arrive at the school on that day?

A I wouldn't know.

Q Approximately?

A Since 1 o'clock has been mentioned so many times, but I didn't know what time it was.

Q After the officer spoke to you -- withdrawn. Were you in the group that the officer spoke to when you first arrived in front of the school?

A Yes, I was.

Q After the officer spoke to you, did Mr. Sprowal go to the south side of the street?

25. Abel - For the Defendants - Cross

A No, he did not.

Q Did he ever go to the south side of the street, other than at the time when you were placed under arrest?

A He may have. I don't know. I think not.

Q And did Mr. Gordon go to the south side of the street after the officer spoke to the group?

A No, he did not.

Q Did you see Mr. Sprowal sit down on the sidewalk or any portion of the stoop of the high school?

A No, he didn't.

Q At any time?

A No, he did not.

Q Did you hear the officer speaking to Mr. Sprowal when you first arrived in front of the school?

A Yes.

Q Did you hear him say to Mr. Sprowal that he could not loiter about and hand out leaflets in front of the school?

A I heard him say, "You can't hand out leaflets here.

Q Did you see any signs in the school saying,

26. Abel - For the Defendants - Cross

"No loitering"?

A No, I didn't.

Q Now, approximately how much time elapsed from the time you first arrived at the school until the time you were arrested?

A About ten minutes. That's all.

Q Now, did the officer go into the school building after he first spoke to you?

A Yes.

Q And did you hear Mr. Sprowal testify yesterday that the officer went into the building for about ten minutes and then came out?

A Yes.

Q And would you say the officer was in the building for ten minutes?

A I wouldn't know. He was there between five and ten minutes, I would say. No, probably less, I guess he was there about five minutes; but I could not be sure of that.

Q Do you remember after you were placed under arrest the officer asking you what you did for a living?

A I don't remember his asking any questions until

27. Abel - For the Defendants - Cross

we were taken to the police station.

Q Did you ever tell the officer at any time what you did for a living?

A I don't remember if he asked me.

Q Did you tell the officer at any time that you were a student?

A I assume if he asked me I told him.

Q Or did you tell him you were unemployed?

A Well, I am both. I don't know what I said.

Q Isn't it a fact that after the officer told you to move to the -- or move out of the block, that you could not distribute leaflets in front of the school you just shook your head and didn't move?

A He told us twice to move.

Q Isn't it a fact that you shook your head and did not move?

A No, it is not. I started walking down the street.

Q On the north side of the street?

A On the south side of the street.

Q Well, you were on the north side when the officer spoke to you, weren't you?

28. Abel - For the Defendants - Cross

A The first time the officer spoke to me?

Q Yes.

THE COURT: That is what he means.

A I thought you meant the second time. The first time the officer spoke to us, immediately Mr. Sprowal said, "Go across the street," and we crossed the street. I didn't shake my head or anything else.

Q After the officer told you you were under arrest, you say on the south side of the street, is it not a fact that you walked away from the officer?

A No, it is not. We were walking around. We continued walking around. There were a few students trying to hand out leaflets, and he said, "Stand still."

Q Isn't it a fact that you walked towards Mr. Sprowal?

A No. I was walking towards Mr. Sprowal?

Q Answer my question.

A No, it is not, Mr. Sprowal was already there.

Q Isn't it a fact that you and the previous witness walked away from the officer after he told you you were

29. Abel - For the Defendants - Cross

under arrest?

A Pardon me?

Q Isn't it a fact that you and the previous witness walked away from the officer after he told you you were under arrest?

DEFENSE COUNSEL: Objection. That has already been answered from the previous questions.

A No, that is not true.

Q Have you ever been convicted of any crime?

A No, I haven't.

DISTRICT ATTORNEY: I have no further questions.

THE COURT: Thank you. Step down. Anything else?

DEFENSE COUNSEL: I would like to ask Steve Gordon to take the stand.

S T E V E N G O R D O N was called as a witness on behalf of the defendants, and after having first been duly sworn, testified as follows:

BRIDGE OFFICER: Name, address, and occupation.

30. Gordon - For the Defendants - Direct

THE WITNESS: My name is Steven W. Gordon, of 60 Noel's Crescent, Bronx 63, New York. I am a school teacher.

THE COURT: Where do you teach?

THE WITNESS: I have not yet received my assignment. I have just received my license this summer. I just graduated from New York University.

THE COURT: I see. You are not employed by any educational body, are you?

THE WITNESS: Not as of yet.

THE COURT: You have a license to teach?

THE WITNESS: I have a license, and I should receive my assignment soon.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. McCAULAY:

Q Mr. Gordon, on May 29, were you in the vicinity of Charles Evans Hughes High School?

A Yes, I was.

Q I show you this copy of People's Exhibit Number

31. Gordon - For the Defendants - Direct

2. Do you recognize this?

A Yes, it was the leaflet that I was handing out.

Q Will you tell the Court what occurred that day and why were you down there?

A Well, the purpose of being in the vicinity of the school was to distribute CORE, Congress of Racial Equality, leaflets, educational leaflets, because the Congress of Racial Equality was having a summer project.

DEFENSE COUNSEL: Your Honor, I move to strike this testimony as being irrelevant.

THE COURT: I think so.

Q Please tell the Court what happened that day?

A Eight of us approached the school on the north side of the street, walking down from Eighth Avenue towards Ninth Avenue. As we approached the center entrance of the school, we noticed there were two people there, a patrolman and a man with a press shield. As the group approached, the officer told the leader of our group, Mr. Sprowal, after seeing the material -- excuse me, that is not quite right. First he asked Mr. Sprowal what we were going to hand out there, and Mr. Sprowal showed him

32. Gordon - For the Defendants - Direct

a leaflet; and the officer said that we could not hand out leaflets on that block.

Afterwards Mr. Sprowal told the group that he did not want any of us arrested; that if anybody was going to be arrested it was going to be himself, and directed us to cross the street, to the opposite side of the school, in front of a vacant lot; that is, Kathryn Abel, Mary an Siderelis, James Lanier, and myself.

Q Did you cross the street to the south side?

A I crossed to the south side, and then I saw immediately that there were practically no students there at all; and for me to reach the people I decided to go to the north side of the street, towards Eighth Avenue, near the corner of Eighth Avenue and 18th Street

I therefore went up to the -- it was approximately the distance of between my chair and the wall of the courtroom, from the corner of Eighth Avenue on the --

THE COURT: That will be about 30 feet?

THE WITNESS: I figured it was about ten yards.

33. Gordon - For the Defendants - Direct

THE COURT: Then you agree with me. Ten yards is 30 feet.

THE WITNESS: Yes. I remember I was walking there, and I gave out leaflets in that area to students and passersby. This took a few minutes. Then, after I was giving out leaflets for a couple of minutes, Mr. Sprowal started coming towards me. Then he turned around, and when he got a few feet of me, he said -- I don't know; he said something, but I don't remember what it was. Then he went back towards the people in the opposite side of the street, who were giving out leaflets.

I continued to give out leaflets for another few minutes, and then another patrolman came towards me and told me that the patrolman down there -- He pointed to Patrolman Grunitz and the other defendants. He said he wanted to speak to me. So I went down there with the other officer, and Patrolman Grunitz said I was under arrest.

Q You say "down there." What do you mean?

34. Gordon - For the Defendants - Direct

A Directly across the main entrance of the school, on the south side of the street, across the street from the main entrance.

Q Approximately how many leaflets did you distribute?

A It could not have been more than 20, at the most.

Q Do you have any estimate of what portion of these were to students?

A Less than half, much less than half.

Q You gave leaflets out to other than students?

A Yes, I was near the corner, and there were passers-by, very few students at that point.

Q Why did you go down to 18th Street, near the school to give out the leaflets?

A Well, I noticed there was a trek of students coming out of the building when I started to come down from the subway, and at the subway entrance there were some of the students, who were going by the subway entrance. I was hoping to reach more students that way.

Q What was your purpose in going to the school at all to distribute these leaflets?

35. Gordon - For the Defendants - Direct

DISTRICT ATTORNEY: Objection.

THE COURT: I don't see any relevancy at all. Sustained.

As I understand it, the substance of the literature is not critical. There is no charge that there was anything illegal in the substance or the contents of the literature. I don't think that is involved here.

DEFENSE COUNSEL: One of the important considerations of the Statute is -- of Section 722 (b) -- is whether a person has a legitimate purpose to be near the school.

THE COURT: That is not the Statute. Oh, no, no. You cannot determine guilt or innocence on the basis of the subjective purpose which you might characterize as legitimate and somebody else may not. The word "legitimate" is entirely too loose in contents. I don't think it has any critical bearing on our problem here.

DEFENSE COUNSEL: I must take an exception.

THE COURT: Well, we have your

leaflets here in evidence. Don't we? Don't we have your leaflets here? Your leaflets are in. However, beyond the leaflets themselves, do you want to go and explain a subjective purpose? We have the leaflets.

DEFENSE COUNSEL: I wish to go a step further, to the statement by the witness as to their purpose in distributing the leaflets.

THE COURT: Is there an objection?

DISTRICT ATTORNEY: Yes, Your Honor.

THE COURT: The objection is sustained.

DEFENSE COUNSEL: I take an exception.

THE COURT: All right, go ahead.

Q Mr. Gordon, did you see the other four defendants here today distribute literature?

A Yes, I did.

Q Can you tell us which ones you saw and where they were distributing?

A I saw Mr. Sprowal, who was just to the east of the main entrance, on the north side of the street; and I saw the others: James Lanier, Miss Abel, and Miss

Siderelis, on the south side of the street. This is to the best of my recollection. There are certain points at which I did not see them. When I was walking towards Eighth Avenue my back was towards them, and I could not see everything that transpired at that time.

Q But you did see each of the defendants in the locations you have identified distributing literature?

A Yes, that's right, when I was facing in the particular direction of the school. As I say, I was in the east of the main group, and I had to walk with my back towards the group in order to get to that point.

Q When you were distributing leaflets, what structure were you standing in front of?

A It was a row-house apartment building.

THE COURT: A what?

THE WITNESS: A narrow apartment building, tent type. I call them row houses.

THE COURT: Row?

THE WITNESS: Yes.

THE COURT: How far was that, east of the school? How far east of the easterly end

38. Gordon - For the Defendants - Direct

of the school was that?

THE WITNESS: I place it to be 100 yards.

THE COURT: All right.

THE WITNESS: That is from the easterly border, down by the school proper, a hundred yards beyond that.

THE COURT: One hundred yards east of where you were standing?

THE WITNESS: Yes.

THE COURT: And also 100 feet west of the corner? One hundred feet west of the corner, the intersection?

THE WITNESS: No, about 30 feet off the intersection, off the building line.

THE COURT: All right. Anything else?

DEFENSE COUNSEL: I have no further questions.

THE COURT: Cross.

CROSS - EXAMINATION

39. Gordon - For the Defendants - Direct

BY MR. RYAN:

Q Mr. Gordon, Mr. Sprowal you say came walking towards you? Did you see him distributing leaflets?

A As I said before, for a brief while --

Q Just answer the question. Did you see him distribute leaflets?

A Yes.

Q And was he standing east of the main entrance of the school?

A Yes.

Q And is the main entrance in the center of the school?

A Yes.

Q When you first arrived in front of the school, what time was it?

A It was shortly after 1 o'clock.

Q And about what time were you arrested?

A It was about a quarter after, if I remember correctly. About a quarter after or 20 after. I am not sure.

Q After this police officer spoke to the group, did you hear the police officer talking?

40. Gordon - For the Defendants - Direct

A Yes. Excuse me. Can I ask one question?

THE COURT: No, no.

A At which time?

THE COURT: The first time.

Q The first time.

THE COURT: When you were all in front of the school, when the eight of you were there?

Q When you first arrived to the school the officer spoke to your group, didn't he?

A Yes.

Q And did you hear him speaking?

A Yes.

Q Did he tell you that -- or tell the group that you could not loiter about the school and hand out leaflets in front of the school?

A He didn't put it in those words, no.

Q Words to that effect?

A I can give you his words.

THE COURT: Yes, please do.

A He said, "You can't give out leaflets on this block."

41. Gordon - For the Defendants - Cross

THE COURT: All right, next question.

Q And was it at this time that you proceeded towards Eighth Avenue?

A No, first I crossed the street, and then went towards Eighth Avenue.

Q After you crossed the street to the south side you then returned to the north side; is that correct?

A Not directly. I walked up on the south side a ways before I crossed the street.

Q And when you were on the south side of the street did you hand out any leaflets?

A No, I didn't.

Q Do you know if the other people who were on the south side of the street hand out any leaflets?

A They did.

Q Did you see them hand out the leaflets?

A I saw a few being distributed. There were very few people there at that time.

Q Did you see any signs on the school building that said, "no loitering," or words to that effect?

A No, I did not.

42. Gordon - For the Defendants - Cross

Q Sir, have you ever been convicted of any crime?

A No, I have not.

DISTRICT ATTORNEY: I have no further questions.

THE COURT: All right, sit down.

DEFENSE COUNSEL: Your Honor, we have one witness we would like to place on the stand.

THE COURT: Go ahead. Raise your right hand, please.

RICHARD HIGMAN, was called as a witness on behalf of the defendants, and after having first been duly sworn by the Court, testified as follows:

THE COURT: Sit down. What is your name?

THE WITNESS: Richard Higman.

THE COURT: What is your address?

THE WITNESS: 210 East Third Street.

THE COURT: I didn't get your name.

THE WITNESS: Richard Higman.

THE COURT: Do you go to school or work?

43. Higman - For the Defendants - Direct

THE WITNESS: I am a student at NYU.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. MCCAULAY:

Q Mr. Higman, were you in the vicinity of Charles Evans Hughes High School on May 29?

A Yes, I was.

Q Were you in the group of people that was testified to as having walked towards the center of the school from Eighth Avenue?

A Yes.

Q Will you please tell the Court what you saw that day?

A As we walked down 18th Street, we approached a police officer and another person whom I assume was a reporter; and as we came up to them the police officer began to speak to Mr. Sprowal, and I overheard part of the conversation; and the police officer told us that we could not distribute leaflets on the block; and I believe he said that we could distribute them across the street, and Mr. Sprowal--

DISTRICT ATTORNEY: I am going to object to that, what the witness believes.

THE COURT: When you say you believe, do you use "believe" to mean or to indicate a weaker impression than an absolute impression?

THE WITNESS: I don't recall his exact words.

THE COURT: Is that the substance of what you recall?

THE WITNESS: Yes.

THE COURT: We'll allow it.

A Then Mr. Sprowal told us he didn't want any of us arrested, and he told us to go across the street; and at that time, I, Miss Siderelis, and Miss Abel, and Mr. Lanier, and I believe Mr. Gordon, all went across the street, to the south side of 18th Street.

Q Did you distribute any leaflets on the south side?

A No, I didn't.

Q Did you distribute any leaflets at all?

A No.

THE COURT: He is not involved

45. Higman - For the Defendants - Direct

here.

A At that time --

THE COURT: Don't say anything.

You are not a defendant in this case.

What else do you want to ask him?

Q Did you observe the five defendants in this case distributing leaflets?

A I observed Mr. Sprowal distributing leaflets.

Q And where did you observe him distributing leaflets?

A In front of the school, on the north side.

Q Did you observe anyone else distributing leaflets?

A No.

Q When you went to the south side of the street, the four defendants you mentioned, three or four, I am not sure how many, did you observe the policeman?

A Yes.

Q Where was the policeman?

A The policeman was standing with Mr. Sprowal in front of the school as we crossed the street.

Q Were you and the four other defendants on the other side of the street; that is, on the south side of

the street when you saw the policeman with Mr. Sprowal?

A I don't remember. I remember as I stepped off the curb the policeman was still with Mr. Sprowal.

Q How long did you stay on the south side of the street?

A I stayed there for about a minute or two minutes.

Q And then where did you go?

A Then I went up towards 18th Street, up towards Eighth Avenue, and left.

Q And left? Did you see the policeman as you left?

A No, I didn't.

DEFENSE COUNSEL: All right, no other questions.

THE COURT: Any questions?

DISTRICT ATTORNEY: Have you ever been convicted of any crime?

THE WITNESS: No, I havent.

DISTRICT ATTORNEY: I have no further questions.

THE COURT: All right, step down. Thank you. Both sides rest?

DISTRICT ATTORNEY: People rest. Withdrawn. Defense rests?

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MR. MCCAULAY: Yes.

DISTRICT ATTORNEY: People rest.

THE COURT: Do you want a few minutes to tell me what your view of the law is.

I will tell you in advance what I believe is the question here. You have on the one hand the Constitutional right growing out of the amendment which permits freedom of speech, the First Amendment, your right to picket, your right to inform people, your right to assemble, your right to petition, the rights that are embodied in the First Amendment.

On the other hand, you have what amounts to a police power statute enacted for the purpose of keeping the schools free of any type of interference which would impinge on the major function of the school and the students in the school.

Now, you then, in a sense, have a possible collision between two rights, both of which I think have a certain degree of sacredness, because without the practical opportunity of students to learn and

to be shielded from certain influences; and this says absolutely nothing about the content of your exhibits, you could not fulfill the desirable effort of educating the young. That is the problem here, the question: To what extent the right to have your privilege of free speech can go when it gets into an area where it may possibly hurt the process of education and of children in the school to remain free from disturbing influences.

Is that your general impression of the problem? I may not have stated it the way you do state and advocate it, of course, the way you think is most important.

I have given you this very preliminary outline to try to enable you to save time. I will give you exactly ten minutes, though we had a fairly long trial as far as trials go in this court. It is five after. You have until a quarter after and you can tell me anything you want.

Then we will give the People an opportunity, also a maximum of ten minutes.

MR. MCCAULAY: With the Court's

preliminary statement, I think ten minutes will be adequate, because then I will short-circuit some of the references I will make.

I make reference to Section 722 (b), inasmuch as I gather this to be more significant from the Court's point of view.

THE COURT: Yes, I may as well tell you now that with respect to that count which is embodied in the charge of 722, I am going to find all the defendants not guilty. I find a reasonable doubt as to all the defendants with respect to 722; that is, the general disorderly conduct charge.

So, you can address yourself to the impact of 722 (b) solely.

MR. MCCAULAY: Exclusively, thank you. I think, with the Constitutional issues in mind, we have to look initially at 722 (b) from the point of view of the statutory interpretation; and to do this I would point out that the purpose in passing that statute was to give the police an opportunity to keep people who may be selling

narcotics or pornography to school children away from the immediate vicinity of the school, simply because this had come to be one of the matters of concern to principals and teachers at the time, and that the appropriateness of a statute like this must be construed in light of what makes sense for it to be directed.

THE COURT: There is a case right against you on that, you know? That case states clearly it is not only degenerous -- I will give you the time when I interrupt you -- but the case against you and the annotations do not delimit the presence of outside influence.

MR. MCCAULAY: I believe that case, as with most of the cases --

THE COURT: Go ahead anyway. You understand that 722 (b) and its general Constitutional aspects have been upheld by the Court of Appeals?

MR. MCCAULAY: Yes.

THE COURT: That may save us a little time.

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MR. MCCAULAY: This goes directly to the second point I was to make, which I will integrate with the first; substantially, that the issue here has to do with the rights of these people and the balancing that you indicate is necessary to make when on the public sidewalks and streets in front of the school.

I think we have no concern here with the applicability of this Statute to being on the premises of the school; that is, within the school and the school play yard and anything of that order.

I believe that most of the cases to which this Statute applies in a broader sense are cases where individuals were in the school building, one case of a kid who was no longer a student.

THE COURT: I am familiar with that.

MR. MCCAULAY: So that I feel that the statements in the cases where that was the factual situation did not have to consider this more difficult problem of what is a reasonable interpretation for this Satute in terms of the purpose of

the people who are there, when these people on the public sidewalks and the public ways, which have always been considered --

THE COURT: You think this case is not one of completely novel impression?

MR. MCCAULAY: It is not completely novel, because there is the case of People v. Dennis, where a group of mothers in the City of New Rochelle attempted to enroll children who are not within the school boundary, in the school district, and they came towards the school and they were arrested under the Statute. In that case, even though their activities could be said to fall specifically under the words of the Statute, because they were not parents and they were not students and they were not within the school boundary, and, therefore, could, if the Statute were construed in a broad fashion, be said to cover them, the Court said that they were there for a legitimate purpose, which was to attempt to enroll their children in this school.

This, I believe, was a protest against de

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facto segregation; but, anyway, they were there for this which was a legitimate purpose; and the Statute did not have the purpose of covering these particular defendants.

THE COURT: That was the Supreme Court?

MR. MCCAULAY: No, this is a City Court, in the City of New Rochelle, in 1960. I don't believe the case went up. Well, they obviously didn't; they were dismissed.

So, this is one of the very few cases where the defendant was not on the school property itself; and I think this distinction is a very important distinction to keep in mind in construing what the Statute should mean to avoid a constitutional issue, because these people, after all, were on the public sidewalks, public sidewalks which the Supreme Court has time and again said are proper places for distribution of literature.

I refer to the fact that the Supreme Court in the Snyder vs. State case in 1939 had to concern itself with five different statutes of a similar

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nature and make this balancing; and in these cases they said very specifically that the purpose of keeping the streets clean or preventing the passage of undesirable literature and also purposes that were adduced by the states in each case, were not sufficient to warrant taking even a portion of the street away from the general public as a place for the communication of ideas.

I think there is also a case in New York State in which the Court of Appeals in the case of People vs. Diaz had to construe another statute. This was involving loitering in a particular town in upstate New York, and they deemed the statute invalid because it simply prevented people from congregating on the street.

Actually, I take that back. This goes to the application of the constitutional issue on the 722.3, and I think we can dispose of this here. We are considering only 722 (b). The balance we have to make is whether

or not there is any justification in saying to people that this area can be taken away from them, the general sidewalks and parks which the United States Supreme Court has opened for the distribution of literature.

In considering this I think a particular factor that must be kept in mind is the purpose of the defendants here in going to the school, which was to address -- to get this literature, specifically, to the students of the school. This, I think, can be inferred from the literature and the fact that they were there.

This is what I hoped to bring out from their own mouths in their testimony. This was their purpose, and to say to these people that they can go somewhere else on Eighth Avenue or Ninth Avenue and distribute these leaflets was to make it for all practical purposes impossible for them to achieve communication with their intended audience.

The testimony shows that except for Mr. Sprowal, who was in front of the school, even

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those who were across the street and down the block from the school were unable to distribute more than a relatively small number of leaflets to the students coming out, simply because they were moving them away or they themselves moved away from the students.

Therefore, it isn't that they had another alternative in order to communicate with these students, and the courts have pointed out in the various cases that this is also a factor that must be considered; that you cannot say to people, "Well, you have another way of communicating," if in fact that is a meaningful or practical way of their communicating with their intended audience.

In connection with 722 (b) I would also like to make one other separate point which is different from this major free speech constitutional point; that is, that 722 (b) has been denoted a disorderly conduct statute. It is under disorderly conduct, and it seems to me that it is somewhat improper for the Criminal Law, which after all must be interpreted as against the State--

for a statute to give fair notice to people, to say to people that the distribution of literature in any public street, anywhere, comes under the denomination of disorderly conduct, if this conduct, even though you may consider it prescribed by the words of the statute, were termed, "arson," this would be considered an absurd a void-for-vagueness type of labeling for the particular conduct involved.

I think it is improper under the strict construction of the Criminal Law to hold these defendants liable for disorderly conduct, a statute which is labeled, for distributing leaflets in the public ways.

I think this is a consideration quite separate and apart from the constitutional consideration, though certainly when it is applied to a situation that people legitimately expect to have a certain amount of freedom, it just highlights the problem of calling something like this "disorderly conduct."

May I point out that in the Administrative

Code, where commercial literature is involved and where a constitutional issue is not involved, the disorderly conduct is not the kind of an offense which is brought against people who might distribute commercial literature in front of or near a school, which is also prescribed under the New York City Administrative Code.

There is one other aspect of the statute which should be pointed out, and that is the statute specifically says that with the permission of the principal or custodian or person in charge of the school people may do whatever the statute says you can do; namely, distribute literature, congregate, come in the premises, or what have you.

Under the United States Supreme Court case of Lovell vs. Griffin and Haig v. CIO, it seems to me that this statute is invalid on its face if its construed to be applied to the distribution of literature, because it also requires or it also permits an exception to be made by an

official of the school involved, in this case a public school. So, that the official is a public employee and an officer of the state for the purpose of the statute.

THE COURT: Well, I think your time has just finished.

MR. MCCAULAY: I think it is invalid on its face, and for this reason it is a pre-censorship type of requirement that a state officer can decide who or who cannot distribute literature on the streets.

If we construe the statute to the distributing of literature, that kind of a statute has no validity when we are talking about non-constitutionally protected activities. It also renders the statute invalid when constitutionality is involved, as here.

Accordingly, I feel Section 722 (b) must be construed not to apply to this particular situation; and if it does apply to this situation, it is invalid both because it takes away without sufficient justification the right of people to

use the public streets to communicate with their intended audience, and because it has a pre-censorship requirement written right into the statute.

THE COURT: All right, Mr. Ryan.

MR. RYAN: I just have a few comments, Your Honor.

First of all, 722 (b), as Your Honor knows is a statute entitled "loitering in school buildings." However, the actual text of the statute is broader than that. It was well-conceived, and it was well written.

THE COURT: Well, the actual text uses another preposition, in and about.

MR. RYAN: In and about.

THE COURT: In or about. There is a disjunctive there.

MR. RYAN: They must have had in mind New York City schools, which do not have in many instances the benefits of having a well-distinguished campus of the rural type. I think that the officer acted in the right manner in this

case by placing the defendants under arrest; that the defendants have attempted to justify their acts by stating their motives; that they have attempted to use the end to justify the means which they did use and which was testified to today and yesterday.

As far as the disorderly conduct, Your Honor, I guess Your Honor has already ruled on that.

THE COURT: I indicated my intention. If you think you can persuade me otherwise—

MR. RYAN: Just one point, Your Honor, the disorderly conduct does not have to be in progress for an arrest to be made. Just that actions whereby a breach of the peace may be occasioned is sufficient grounds for a disorderly conduct.

I have no further comments.

THE COURT: All right.

Well, the way I feel about this case is this: We are not dealing with an abstract, because

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we apply principles; but if we were going to have the abstract proposition of which is the dominant influence, and if I decided that a man has unlimited constitutional right to distribute literature anywhere, at any time, any place -- I am addressing myself to the defendants -- I think you would concede that that would be a resolution which would be so impractical that it might just as well nullify any other right that anybody else may have.

I think that in the context of the proof here the officer had a right to determine, under all the circumstances in this case, what were the allowable bounds beyond which persons could not go, because if they did go beyond those bounds they would be in interference with the purpose of education which it seems to me was basic to the enactment of 722 (b). That is my general thought in the matter.

Now, to get down to findings of fact, I have already indicated that I am going to dismiss count one as to all the defendants; and that is

my decision. I have a reasonable doubt as to all the defendants.

As to the defendants Siderelis, Abel, and Lanier, I make a finding of fact that there is a reasonable doubt as to their guilt, and therefore find those three not guilty as to Section 722 (b).

With respect to the defendants Sprowal and Gordon, I find that they violated what I consider in the context of the testimony here, they violated the statute as I feel bound to interpret it on the facts in the case. I therefore find both defendants guilty of violation of Section 722 (b), Gordon and Sprowal.

BRIDGE OFFICER: Stand up, please.

THE COURT: Now, do you want a date for sentence. I think you ought to have an investigation in this case, preliminary to sentence. What date do you want?

MR. MCCAULAY: I believe probation requires three weeks or so. Is that it? We would appreciate a date prior to the 26th.

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THE COURT: Well, actually, October the 19th is the date that they want. Is probation around?

MR. MCCAULAY: October 19 is satisfactory.

THE COURT: It is? Parole is continued, as to both defendants; and this is to be for investigation and sentence. Would you want a shorter interval?

MR. MCCAULAY: Only if it is prior to September 26.

MR. RYAN: Your Honor, I have to ask for September 26.

THE COURT: How about the 19th?

MR. MCCAULAY: Fine. Fine.

THE COURT: Thank you for your presentation of the case. That is my opinion on the question of law, and I made findings of fact too, necessarily; but I feel that I can't agree with your position which in effect there was a limitless right under the first amendment and that nothing else can come in collision with

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it. I think on the facts here that that right must have been limited by the circumstances in the case. All right, thank you.

* * *

The foregoing is a true and correct transcript of minutes in this case.

Alejandro Gonzalez
Official Court Reporter
November 25, 1964

-1- (Sentence)

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 3 - COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK
on complaint of

Officer Gruntz - 10th Precinct

-versus-

WILLIAM SPROWAL. . . . .Defendant.

DOCKET NO.
C-11355

CHARGE:
Sec. 722-B, P. L.

New York, N. Y.
Date: November 10th, 1964.

B E F O R E :

HONORABLE NEAL P. BOTTIGLIERI, Judge.
Bridgeman: George Monahan

A P P E A R A N C E S :

A. Dan Harris, Asst. District Attorney, N. Y. County,
for the People.

Lloyd McAulay, Esq., 165 Broadway, New York, N. Y.
for the Defendant.

Defendant Present.

---oOo---

F. WEINBERG
COURT REPORTER

COURT OFFICER: Calendar Number 56, Docket Number C-11355, William Sprowal, charge of Disorderly Conduct, Section 722-B of the P[illegible] V, defendant represented by Lloyd McAulay, [illegible] Broadway, New York.

THE COURT: Counsellor, this defendant has other matters which he has to appear on this month, hasn't he?

MR. MC AULAY: I believe so; there is one this month.

THE COURT: He has about three different charges on the 22nd.

MR. HARRIS: That was adjourned to October 22nd.

THE COURT: What happened to those matters that were on for October 22nd?

MR. MC AULAY: I don't know; I just appeared today.

THE DEFENDANT: I got a suspended sentence on one and one was postponed for the 24th.

THE COURT: The 24th of when - November?

THE DEFENDANT: Yes, Sir.

THE COURT: Which one did you receive the suspended sentence on?

THE DEFENDANT: Sitting in at the Municipal Building.

THE COURT: For Disorderly Conduct?

THE DEFENDANT: Yes, Sir, Disorderly Conduct, your Honor.

THE COURT: What about the charge of 1851, Interfering with a Police Officer?

THE DEFENDANT: That one was thrown out of court.

THE COURT: What about the violation of Section 2036, the Unlawful Entry on Real Property; which one is that?

THE DEFENDANT: That is the Sitting In in the Municipal Building. One Entry on Real Property - Disorderly Conduct was postponed - and one I got a suspended sentence on and one was thrown out of court.

MR. MC AULAY: I would like to make some comments on this particular case.

THE COURT: Is there any legal cause

why he should not be sentenced now?

MR. MC AULAY: No.

THE COURT: Is there anything you wish to say in his behalf?

MR. MC AULAY: Yes; I wish merely to point out that Mr. Sprowal was found Guilty under Section 722-B, which is labeled "Disorderly Conduct", but unlike all the other sub-sections of Disorderly Conduct it does not include in the preamble of Subdivision B that type of conduct which requires a showing that a breach of the peace has been occasioned, or may be occasioned. He was found Guilty only of distributing leaflets in front of a public school, under Section 722-B, which merely requires loitering at or about a public school.

Accordingly I would point out that this particular kind of Disorderly Conduct which is something of a misnomer, is not like the other subdivisions of Disorderly Conduct in that a breach of the peace element is not involved here - it is more like a loitering on the streets

-5- (Sentence)

and a whole range of offenses which, I think, do not warrant the same kind of sentence as a breach of the peace, and it warrants a much milder one.

Secondly I want to point out that he was distributing literature to students such as you have in a commercial matter and any of the defendants involved in this case felt that this was perfectly proper language in the literature found anywhere in the streets of New York. And this statute was brought to bear and he was found Guilty under it.

I am not contesting the fact that this defendant was charged with Disorderly Conduct; I am only pointing out the nature of the offense.

I would also point out that five people were arrested at the same time and went to trial and three were found not guilty because they were across the street. So that, since this is the first time there was a conviction under Section 722, for Mr. Sprowal, I think something like a suspended sentence is in order

because of what is involved.

THE COURT: Mr. Sprewal has a fingerprint record in this and other states which starts in 1948 when he was arrested as a Delinquent in Pennsylvania.

In 1952 he was charged with Rape and Assault and Battery, in Philadelphia.

In 1956, he was arrested for Suspicion of something or other down in some other state.

In 1959 he was charged with 1751 of the Penal Law - Narcotics.

In 1960, in Philadelphia, Narcotics again.

In Manhattan, Narcotics, where he got a sentence by Judge Culkin.

In 1960, Assault and Robbery, in November.

In 1961, Section 1897.

In 1961, Narcotics again.

In 1962 he was arrested on a gambling charge which he was acquitted of.

And in July, the 22nd, of 1963, he was arrested for obstructing an officer - a police officer and for Disorderly Conduct and he got thirty days Suspended Sentence on both charges.

-7- (Sentence)

Then he repeats the same charge here. That is the record.

MR. MC AULAY: I merely point out that the particular offense for which he is before you is not a repeat of that Subdivision B, and that it is the identical offense on which the others were found Not Guilty.

THE COURT: He has thirty days suspended previously on each charge, so that is sixty days hanging over his head on the last conviction where he got a suspended sentence.

The judgment of the Court is that defendant be committed to the Workhouse for a period of sixty days.

: : : : : : : : : : : : : : : : : : : :

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF MINUTES OF SENTENCE IN CASE OF PEOPLE VERSUS WILLIAM SPROWAL, DEFENDANT.

F. WEINBERG
COURT REPORTER

---oOo---

PEOPLE'S EXHIBIT 1

To New York City students:

Downtown CORE needs your help this summer

to launch "Operation East Side"—a massive attack on racial discrimination, inferior education, dilapidated housing, and low voter-registration in the lower East Side Ghetto.

We need your help in Downtown CORE task-forces to deal with the explosive problems that are rapidly developing in one of the most depressed and underprivileged areas in New York City.

We need socially dedicated students who are prepared to go into the slums of an area that is still festering in the depths of the Great Depression. We need your help to intensify the East Side rent strike; to gain better material conditions for the one out of four people who are unemployed in the ghetto. We need your help in local civil rights demonstrations; in an area-wide attack on police brutality; in a massive voter registration drive.

We need your help this summer for a militant, direct-action program to remove one of the most shameful stains on our community.

If you are willing to give all or part of your time to the Civil Rights Revolution here, in your *own* city, and if you are willing to conduct a *real* war on poverty, discrimination, and underprivilege, communicate with:

downtown CORE

66 Delancey Street / New York 2, N. Y. / OR 3-1590

STOP POLICE BRUTALITY!

YOU CAN ACT AGAINST POLICE BRUTALITY NOW

BY SUPPORTING THE WEISS BILL FOR A CIVILIAN REVIEW BOARD. AT THE PRESENT TIME THE POLICE DEPARTMENT IS THE SOLE JUDGE, JURY AND PROSECUTOR ON ALL ACTS OF POLICE BRUTALITY.

THE WEISS BILL WILL SET UP A INDEPENDENT REVIEW BOARD COMPOSED OF CIVILIANS AND COMMUNITY LEADERS WHO WILL INVESTIGATE ALL CHARGES OF POLICE BRUTALITY.

PEOPLE'S EXHIBIT 2

139 B

JOIN DOWNTOWN CORE ON SAT. MAY 30 th. AT 12:00 NOON ON A PICKET LINE AT THE 9TH PRECINCT, 5TH STREET BETWEEN 1ST AND 2ND AVE. FOR FURTHER INFORMATION CALL DOWNTOWN CORE OR 3-1590. _ _ 66 DELANCEY ST.

DESEAMOS QUE LA POLICIA SEA MAS COMPRENSIVA CON NOSOTROS Y TERMINEN CON SIERTOS ATROPELLOS QUE HACEN, CON LOS CIUDADONOS ONESTOS Y DESENTES.
EL QUE SE HAGA UNA LEY COMO RECOMIENDO POR EL SIA. WEISS O UNA COOPERATIVA PARA HAGA MAS COMPRENCION CON LOS CIUDADANOS Y LA POLICIA.

EL DOUNTOWN CORE TIENE UNA PARADA MAYO 30 A LAS 12 DE TARDE, Y UNA LINIA DE PIQUETE EN EL PRESINTO 9, CAILE 5 ENTRE LA AVENIDA 1 Y AVENIDA 2

PARA MAS INFORMACION LLAME AL OR 3-1590 66 DELANCEY S

EL DOWNTOWN CORE

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

- x

PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

vs. :

WILLIAM SPROWAL and STEVEN GORDON :

Defendants-Appellants. :

- x

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Lloyd McAulay, being duly sworn, deposes and says:

I am the attorney for defendants-appellants and am fully familiar with all the proceedings herein.

No opinion or memorandum was rendered by the Court below apart from the oral opinion appearing on pages 128 through 130 of the transcript.

Lloyd McAulay
Lloyd McAulay

Sworn to before me
this 19th day of April, 1965

John Q. McQuillan
Notary Public

JOHN Q. McQUILLAN
NOTARY PUBLIC, State of New York
No. 60-7870700
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1966

SENTENCE

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK	:	
Respondent,	:	Docket No.
vs.	:	C11353-11356
WILLIAM SPROWAL and STEVEN GORDON	:	
Defendants-Appellants.	:	

William Sprowal was committed to the Workhouse for a period of sixty days. Sentence was pronounced on November 10, 1964. Receipt No. 12927.

Steven Gordon was sentenced to serve five days' imprisonment or to pay a $50 fine. Sentence was imposed on October 19, 1964.

The defendant Gordon is appealing from the verdict after trial and not from the sentence had thereon.

Defendant Sprowal is appealing from the verdict rendered after trial and from the sentence had thereon but not from any proceedings prior to trial.

DEFENDANT SPROWAL'S FINGERPRINT RECORD

DEFENDANT GORDON'S FINGERPRINT RECORD 143

ATTORNEY'S CERTIFICATION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

- x

PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

vs. :

WILLIAM SPROWAL and STEVEN GORDON :

Defendants-Appellants. :

- x

Pursuant to Section 458 of the Code of Criminal Procedure and Section 215 of the CPLR, the undersigned, attorney for defendants-appellants hereby certifies that the Record on Appeal contains a copy of the Notice of Appeal, certified copy of the complaint, the trial minutes, defendants' fingerprint record, and that the record has been compared and is a true and complete copy.

Dated: this 19th day of April, 1965

Lloyd McAulay

Lloyd McAulay

ORDER SETTLING CASE

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

- x

PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

vs. :

WILLIAM SPROWAL and STEVEN GORDON :

Defendants-Appellants. :

- x

The foregoing case on appeal, containing all of the evidence, is hereby settled and ordered on file.

Dated: this day of April, 1965.

Judge of the Criminal Court
of the City of New York,
County of New York

CLERK'S RETURN ON APPEAL

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

146

- x

PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

vs. :

WILLIAM SPROWAL and STEVEN GORDON :

Defendants-Appellants. :

- x

I, the undersigned, Clerk of the above named Court, respectfully make return to the Appellate Term of the Supreme Court for the First Judicial Department and certify upon the affidavit of defendants-appellants' attorney that there are attached hereto correct copies of the Notice of Appeal and of all the papers required to be returned pursuant to the Code of Criminal Procedure of the State of New York and the Rules and Regulations of the Appellate Term of the Supreme Court of the First Judicial Department.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed this seal of the above Court this day of April, 1965.

_____
Clerk

ADDITIONAL PAPERS ON APPEAL

TO

COURT OF APPEALS

STATEMENT PURSUANT TO RULE 5531 CPLR

COURT OF APPEALS, STATE OF NEW YORK
APPELLATE TERM, FIRST DEPARTMENT

----------x

PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

vs. :

WILLIAM SPROWAL and STEVEN GORDON :

Defendants-Appellants. :

----------x

1. The docket numbers of the cases in the court below are complaints C11353-11356, Criminal Court of the City of New York, New York County.

2. Defendants-appelants, William Sprowal and Steven Gordon, are represented by Lloyd McAulay, Esq. Respondents, the People of the State of New York, are represented by Frank S. Hogan, District Attorney of New York County. No change in the parties has occurred.

3. The action was commenced in the New York City Criminal Court, County of New York.

4. The action was commenced by criminal complaints, sworn to and filed on May 29th, 1964.

5. The complaints charged defendants with violation of 722-b and 722(3) of the Penal Law, prohibiting loitering near a school building. Defendants

were tried jointly and found guilty on September 4th, 1964 of violating 722-b. Three other defendants were acquitted. Defendant Gordon was sentenced to pay a fine of $50.00. Defendant Sprowal was sentenced to sixty-days imprisonment. Defendant Gordon paid his fine. Defendant Sprowal was released on $500.00 bail on a Certificate of Reasonable Doubt.

6. This is an appeal by the defendants from an order of the Appellate Term of the Supreme Court of New York, First Department, entered on or about January 13th, 1966, affirming the conviction of defendant Sprowal and ordering a new trial for defendant Gordon. Leave to appeal to the Court of Appeals was granted by Hon. Stanley M. Fuld, Associate Judge of the Court of Appeals, on February 9,1966.

7. The appendix method is not being used on this appeal.

CERTIFICATE GRANTING LEAVE--SPROWAL

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. STANLEY H. FULD, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

WILLIAM SPROWAL,

Defendant-Appellant.

CERTIFICATE GRANTING LEAVE

BAIL

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to 520 of the Code of Criminal Procedure permission is hereby granted to the above named appellant to appeal to the Court of Appeals.

I further certify that in my opinion there is reasonable doubt whether the judgment of conviction will stand upon appeal to the Court of Appeals.

Bail as at present provided is fixed pending appeal to the Court of Appeals in the sum of $500.

Dated at New York, New York
February 9, 1966

/S/ Stanley H. Fuld
Associate Judge

Notice: Within 15 days from the date hereon an appeal must be taken and this certificate must be filed with the notice of appeal. An appeal is taken by filing in the clerk's office having the

CERTIFICATE GRANTING LEAVE--SPROWAL Cont'd.

judgment roll (trial court) a written notice in duplicate that appellant appeals to the Court of Appeals (522, Code Crim. Pro.) together with proof that another copy of the notice of appeal has been served upon opposing counsel (521, Code Crim. Pro.). The appeal must be argued within 90 days from the date of the notice of appeal (536, Code Crim. Pro.)

CERTIFICATE GRANTING LEAVE--GORDON

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. STANLEY H. FULD, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

STEVEN GORDON,

Defendant-Appellant.

CERTIFICATE GRANTING LEAVE

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to section 520 of the Code of Criminal Procedure permission is hereby granted to the above named appellant to appeal to the Court of Appeals.

Dated at New York, New York

February 9, 1966

/S/ Stanley H. Fuld
Associate Judge

Notice: Within 15 days from the date hereon an appeal must be taken and this certificate must be filed with the notice of appeal. An appeal is taken by filing in the clerk's office having the judgment roll (trial court) a written notice in duplicate that appellant appeals to the Court of Appeals (Section 522, Code Crim. Pro.) together with proof that another copy of the notice of appeal has been served upon opposing counsel (Section 521, Code Crim. Pro.). The appeal must be argued within 90 days from the date of the notice of appeal (Section 536, Code Crim. Pro.)

NOTICE OF APPEAL TO COURT OF APPEALS -- SPROWAL & GORDON

CRIMINAL COURT OF THE CITY OF NEW YORK

County of New York

The People of the State of New York Plaintiff-Respondent vs. William Sprowal and Steven Gordon Defendants-Appellants.	Notice of Appeal Docket No. C11353-11356

PLEASE TAKE NOTICE, that, pursuant to permission granted by the orders annexed hereto of the Honorable Stanley H. Fuld, Associate Judge of the Court of Appeals, made on the 9th day of February 1966, the defendants above named heregy appeal to the Court of Appeals from the order and judgment of the Appellate Term, First Judicial Department, made and entered on the 13th day of January 1966, relating to the judgment of the Criminal Court of the City of New York, County of New York, convicting the defendants, after trial, of the offense of disorderly conduct under Section 722-b of the Penal Law; said order and judgment affirming said judgment convicting the defendant Sprowal and reversing said judgment convicting the defendant Gordon, and, as to Gordon, ordering a new trial.

/S/ Lloyd McAulay

Lloyd McAulay, Esq.
Room 1925
165 Broadway
New York, N.Y. 10006
WOrth 4-7030

Dated:

This 23rd day
of February

TO: Frank S. Hogan, Esq.
District Attorney
of New York County

Clerk of the Criminal Court
of New York City
County of New York

ORDERED APPEALED FROM

At an Appellate Term of the Supreme Court, First Department, held at the County Court House, Borough of Manhattan, City of New York, on the 13th *day of* January *1965.*

Present:—Hon. GEORGE TILZER, J.P.
" " WILLIAM C. HECHT, JR.
" " SAMUEL H. HOFSTADTER (dissenting) *Justices*

FILED
JAN 13 '65
APPELLATE TERM

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

WILLIAM SPROWAL and STEVEN GORDON,
Defendants-Appellants.

June #243

An appeal having been taken to this Court by William Sprowal and Steven Gordon, the defendants-appellants herein from a judgment of conviction by Hon. Reuben Levy, a Judge of the New York City Criminal Court, upon the charge of violating §722-b of the Penal Law, entered on the 3rd day of September, 1964, respectively, and said defendants-appellants having been sentenced by Hon. Neal P. Bottiglieri & Francis X. O'Br and October 19, 1964 a Judge of said Court on the 10th day of November, 1964, as follows:

Sprowal - 60 days in the Workhouse

Gordon - $50 or 5 days

and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from convicting defendant Gordon of violating §722-b of the Penal Law be and the same is hereby reversed, fine remitted and a new trial ordered. Judgment convicting defendant Sprowal is affirmed.

Fine paid 10/19/64 - $50.
Crim. Ct. Part III
Docket #C11353-56
Receipt #_____

Enter

Justice Appellate Term
Supreme Court, First Department

No. 243

JUNE TERM, 19 65

SUPREME COURT
APPELLATE TERM

FIRST JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

WILLIAM SPROWAL and STEVEN GORDON,

Defendants-Appellants.

OPINION BY

TILZER, J.

FILED
JAN 13 1965
APPELLATE TERM

I concur,

I concur,

I dissent and vote to dismiss the Complaint against both defendants in Dissenting Opinion

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT, JUNE, 1965

Present: — HON. GEORGE TILZER, J. P.
" WILLIAM C. HECHT, JR.,
" SAMUEL H. HOFSTADTER,
Justices.

- x

THE PEOPLE OF THE STATE OF NEW YORK, :
Respondent, :
:
-against- : No. 243
:
WILLIAM SPROWAL and STEVEN GORDON, :
Defendants-Appellants. :

- x

Appeal by defendants from a judgment of conviction of the Criminal Court of the City of New York, County of New York, convicting them, after trial, of violating section 722-b of the Penal Law.

Frank S. Hogan, District Attorney, New York County,
[Frederick P. Hafets, Assistant District Attorney,
of Counsel]
for Respondent,

Lloyd McAulay,
Attorney for Defendants-Appellants.

TILZER, J.:

The defendants appeal from a judgment of the Criminal Court of the City of New York, County of New York, convicting them, after trial, of violating section 722-b of the Penal Law. Defendant Gordon was sentenced to serve five days imprisonment or to pay $50.00 and defendant Sprowal was sentenced to serve 60 days in the Workhouse.

Penal Law, section 722-b, entitled "loitering in school buildings," provides:

> "Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct."

Patrolman Grunts testified that at 1:40 in the afternoon of May 29, 1964, while standing in front of the main entrance of the Charles Evans Hughes High School, he observed a group of some eight persons walking toward the school. The school

located on the north side of West 16th Street, in the middle of the block between Eighth and Ninth Avenues, Manhattan. There is no yard or fence between the school and the sidewalk, and the sidewalk is ten to twelve feet wide. Officer Grunts inquired of defendant-appellant Sprowal what the group intended to do and Sprowal replied that they planned to distribute literature in front of the school. The officer then told Sprowal that it was not permissible to hand out such literature in front of the school; that they could distribute the leaflets on the corner or on another block, but that they could not interfere with the students coming in or out of the school. At the time between 250 and 300 students were leaving the school. At the front entrance to the school building was a sign reading, "No loitering. Persons found loitering in front of the building are subject to the charge of Disorderly Conduct."

For some 30 minutes the officer pleaded with the defendants to discontinue handing out the literature in front of the entrance to the school, not to block up the place and get out of the block as they were interfering with the dismissal of the students. Sprowal refused to move and sat down on the street. Four others, of the original group of eight, also refused to move away from the school and continued handing out literature, within five feet from the main entrance of the school, to some 200 students who were milling around the group.*

* The leaflets being distributed requested students to work with and join CORE and also requested support for a bill to establish an independent civilian board to review charges of improper police activities.

Grunts then placed Sprowal and three of the others under arrest. The defendant-appellant Gordon in the meantime had moved 200-300 feet east of the school, where he continued handing out literature. Grunts had a fellow officer summon Gordon to his side, and Gordon having refused to leave the block, was also placed under arrest. At this point, due to the pressure of the students emerging from the school, the officer and the defendants crossed to the south side of the street.

The trial court, in an oral opinion, found three of the defendants, who according to defense testimony never distributed literature on the school side of the street, not guilty of violating section 722-b. Defendants Sprowal and Gordon were found guilty of violating section 722-b. The court did not indicate whether it had accepted the People's or the defense's testimony concerning the position of defendant Gordon on West 18th Street.

It is against this background that we consider the various arguments of the appellants. A legitimate interpretation of section 722-b, in our view, is that the activities of the appellants (passing for the moment the question of whether the acts or conduct of each of the appellants were identical in kind) were not irrelevant to the purpose for which the statute was passed. While the Legislature was concerned primarily with preventing vandalism and assaults on pupils and teachers, it was also advised of the serious difficulties that school authorities

both within and without the City were having with gangs of young people coming into schools, frightening teachers and pupils, creating disturbances and "making nuisances of themselves in or about a public school" (Letter of Executive Secretary of New York State School Boards Associations, Inc., to Governor Dewey, March 31, 1954, in relation to bill that ultimately became section 722-b). The method chosen by the Legislature to protect the schools was a blanket prohibition against the presence of all unauthorized persons from the vicinity of school grounds. If leaflet distributors are excluded from the operation of section 722-b, then the ability of school authorities and police to protect pupils against the distribution of obscenity and narcotics in or about school premises will be impaired. The authorities will be forced to scrutinize every person near a school with leaflets in order to distinguish between those with leaflets only, and others who may have obscene matter and narcotics in addition to leaflets.

Nor do we find that the statute itself is void for vagueness and indefiniteness. The Court of Appeals held the section constitutional against attack on the same ground in People v. Johnson (6 N Y 2d 549). There Johnson actually invaded the school building and grounds of a country school. The fact that the activities of appellants took place on the street in front of the entrance of a New York City public school

does not thereby legitimatize their conduct. We must give to the statute a sensible construction with relation to the evils sought to be prescribed. The protection to be afforded pupils may not depend upon the circumstance that the school in one case embraces an area of many acres in a rural community while in another the school is devoid of grounds and fronts directly on a public street in a large city. The "section was designed to exclude from school areas degenerates, narcotic peddlers, vandals and the like" (dissenting opinion of Fuld, J., People v. Johnson, supra, at page 554). At least as applied to appellants' conduct some five feet from the main entrance to the school, the statute, in using the term "in or about" a school building, is not lacking in specificity (Cox v. Louisiana, 379 U.S. 536 [1965]).

Moreover, section 722-b does not impose a prior restraint on free speech. The restraint imposed by the statute is not one affecting speech. It places an absolute ban on the physical presence of unauthorized persons in the limited areas in or about school buildings. For that matter, the appellants failed to offer any proof of arbitrary or discriminatory application of the requirement of prior approval by the school authorities.

We too are concerned in protecting our citizens in their ancient right to use of the streets for the dissemination of information and opinion. This right, nevertheless, ranks no higher than other rights protected by the constitutions and

is subject to reasonable restrictions when necessary to safeguard the public interest. The right is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order (Hague v. C.I.O., 307 U.S. 515; People v. Stover, 12 N Y 2d 462, 469). It is our "delicate and difficult task" to weigh "the circumstances" and appraise "the substantiality of the reasons advanced in support of the regulation of the free enjoyment of" speech. (Schneider v. State, 308 U.S. 147, 161.)

It must be observed that the statute in the case at bar is not directed at freedom of speech. The fact that it may have a partial and incidental deterrent effect on free speech is justifiable and a necessary concession to the overriding public interest in the maintenance of order and the protection of pupils caused "by the presence of unauthorized persons invading the precincts of our schools such, for instance, as dope peddlers, sex offenders, idlers and trouble makers in general, and other persons harboring some illegitimate purpose involving the innocence of immature school children and youth." (People v. Johnson, supra, at page 552.) Moreover, appellants may not exercise this liberty by taking a stand directly in front of the main entrance of a school, forming a cordon which blocked the erupting mass of students. Prohibition of such conduct would not abridge the constitutional liberty. In order

to assure the safety and convenience of its citizens a state may regulate the times and places and the conduct of those using the streets to impart information through speech or distribution of literature. (Cantwell v. State of Connecticut, 310 U.S. 296, 304.) When those sought to be safeguarded are the youth of the community, any conflict arising between the remedy provided by the Legislature and First Amendment freedoms must be resolved in favor of the statute designed to insulate students from the dangers and evils enumerated. Because of their very youth and inexperience, their susceptibility and exposure to the vices of a large city, the measure of control which the state may exercise for the protection of school students is of much wider scope than that which might be exercised for the community at large. (Prince v. Massachusetts, 321 U.S. 158.)

It must be noted too that the statute impinges on the right to use the street for the dissemination of information in but a minor way. The prescription applies only to streets contiguous to school buildings. And even this forbidden area would be limited to the street in the immediate school area. The appellants before us, as well as their six companions could have achieved their goal of distributing literature to the students without violating the statute by moving to the corners of Eighth and Ninth Avenues, as suggested by the officer.

The interest of the state that its youth shall come to manhood in physical and moral health justifies the statute in issue. Such conclusion is not weakened by any fear that the statute will be utilized to impose a special restraint upon academic freedom. We would not shield our youth from the expression of ideas, even those repugnant to our own. But we would insist that this constitutional right, as all such rights, be exercised in consonance with peace and good order. If not, and if our young citizens be shown an example of disregard of law and apathy on the part of governmental authority, we will have failed in their education as to the true meaning of liberty and freedom. The exercise of a constitutional right cannot license an illegal act. ** * * The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. * * *" (Cox v. Louisiana, supra, at page 554.)

We have indicated earlier that it was impossible to ascertain from the oral opinion rendered by the trial court whether the determination of the defendant Gordon's guilt was

based upon a finding of fact that he stood 300 feet down the city block from the end of the school building and in front of an apartment house thirty feet from a corner, as the defense testified, or that he stood with the defendant Sprowal five feet from the main entrance to the high school, as the complaining officer testified. The defense testimony was at least partially accepted and the officer's rejected by the court by its judgment acquitting three defendants. If the defense testimony was accepted as to the defendant Gordon, since the statute, as we have also noted above, applies only to streets contiguous to school buildings and grounds in the immediate school area, the trial court erred in finding that Gordon violated section 722-b. As a matter of law, under the circumstances of this case, Gordon could not be said to have been loitering in or about a school building or grounds if he was distributing leaflets some 300 feet down the city block from the end of the school building. Accordingly, the judgment convicting the defendant Gordon of vielating section 722-b of the Penal Law is reversed, the fine remitted and a new trial ordered.

With regard to the defendant Sprowal, it is urged that there was no possible justification for imposing a sentence of 60 days imprisonment on this appellant. Since an issue is raised in this regard and since Sprowal's criminal record is

properly to be considered on the question of sentence (Ethical Problems in the Performance of the Judicial Function, Hon. Charles D. Breitel, Associate Justice, Appellate Division, First Department, New York Law Journal, October 13, 1965, page 4), it is to be observed that Sprowal's criminal record in this State dates back to 1959. In 1959, 1960 and 1961 he was arrested and subsequently convicted for violations of the public health law with respect to narcotic drugs. In July of 1963, the sentencing court noted, Sprowal received two 30-day suspended sentences for obstructing a police officer and for disorderly conduct. The record in the circumstances does not disclose adequate reason to commend appellant to clement regard by an appellate court. The judgment convicting defendant Sprowal is affirmed.

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT, JUNE, 1965

Present: -- HON. GEORGE TILZER, J.P.
" WILLIAM C. HECHT, JR.
" SAMUEL H. HOFSTADTER,
Justices.

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refusing to move on when ordered by the police (Penal Law, § 722 [3]) and with loitering in or about a school building (Penal Law, § 722-b), they were acquitted of the first charge and found guilty of the second. Three others of the group, arrested at the same time, were acquitted of both charges. In my judgment, section 722-b is not applicable to the fact pattern before us; if deemed applicable, it is, to that extent, unconstitutional. I would reverse the convictions and dismiss the complaint.

I cannot agree that a citizen's right to use the streets for the dissemination of information ranks no higher than other rights protected by the constitutions. The First Amendment is the "matrix, the indispensable condition of nearly every other form of freedom" (Palko v. Connecticut, 302 U. S. 319, 327). Its guarantees of freedom of speech, of press, of the people to assemble peacefully and to petition for the redress of grievances, were the first of the Bill of Rights to be secured from State abridgment by the "due process" clause of the Fourteenth Amendment (DeJonge v. Oregon, 299 U. S. 353; Grosjean v. American Press Co., 297 U. S. 233; Gitlow v. New York, 268 U. S. 652; Hague v. C.I.O., 307 U. S. 496, 515; see, also, Steelworkers v. Labor Board, 376 U. S. 492 and Sullivan v. Times, 375 U. S. 803). "All have preferred position in our basic scheme" (Prince v. Commonwealth of Massachusetts, 321 U. S. 158, 164). The counterpart of the great canon is to be found in our State Constitution--Art. I, §§ 8, 9.

Nor may I equate the enforcement of child labor laws, as in Prince v. Commonwealth of Massachusetts, supra, with the distribution of literature on the sidewalk (see: Shuttlesworth v. City of Birmingham, 34 L. W. 4009, 4010). Defendants were not loitering in a school building, as was the case in People v. Johnson, 6 N Y 2d 549; the element of trespass is wholly lacking. They were exercising fundamental rights on a public street (Hague v. C.I.O., supra, 307 U. S. 496, 515; Lovell v. Griffin, 303 U. S. 444; see, also, Martin v. Struthers, 319 U. S. 141; Jamison v. Texas, 318 U. S. 413). Their design was proper--not illegal or illicit (Giboney v. Empire Storage Co., 336 U. S. 490).

It is one thing to enter a school building or its grounds without permission or legitimate purpose. It is quite another to distribute a petition on the street. To authorize limitation upon free communication between citizens on a public highway, the facts must disclose an evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that specific conduct be limited or forbidden (Cox v. Louisiana, 379 U. S. 559; Edwards v. South Carolina, 372 U. S. 229, 236-237).

Penal Law, section 722-b, is not such a statute. Nor, in my opinion, was it intended to cover the dissemination of handbills in the vicinity of a school (see: People v. Dennis, 208 N. Y. S. 2d 522). If construed to encompass such activity, the section would come into fatal collision with the constitutional prohibitions already mentioned (see also: Cantwell v. Connecti-

cut, 310 U. S. 296, 304, 307; Schneider v. New Jersey, 308 U. S. 147, 161). For, as noted, regulation of conduct may not be so broadly framed as to stifle freedom of speech (Shuttlesworth v. City of Birmingham, supra; Cox v. Louisiana, supra; Edwards v. South Carolina, supra).

Moreover, if distribution of literature on the street required the prior permission of the officials named in the statute, this would constitute a form of censorship in conflict with the provisions of both constitutions (Lovell v. Griffin, supra). The construction of a statute is inadmissible which involves an inhibited application. An otherwise constitutional enactment may not be unconstitutionally enforced.

The posted "No Loitering" sign at the entrance to the school does not help the prosecution. Is distributing informational matter loitering? I think not--nor is the word "loitering" by itself, and without more, "enough to inform a citizen of its criminal implications" (People v. Diaz, 4 N Y 2d 469, 470). If the posted sign is relied on to bolster the statute, the statute is open to arbitrary enforcement and fatally defective as vague. "It is the rule that for validity a criminal statute must be informative on its face (People v. Firth, 3 N Y 2d 472) and so explicit that 'all men subject to their penalties may know what acts it is their duty to avoid' (United States v. Brewer, 139 U. S. 278, 288; People v. Vetri, 309 N. Y. 401)" (ibid.). Neither the statute nor sign conforms to this rule.

There is no showing in the case before us that the conduct of either defendant was calculated to distract the

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students in their classrooms, or threatened to harm them, or was calculated to damage the school facilities in any way. Absent trespass or disorderly conduct in its normal reading, the finding of guilt by the court below under section 722-b was without legal justification. The intent of the section is to proscribe the presence of intruders and persons without an acceptable purpose in or about a school. It is not intended to stop, on a public street, innocent conduct constitutionally protected.

I, therefore, dissent and vote to dismiss the complaint against both defendants.

1/3/66

AFFIDAVIT OF NO OTHER OPINION

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

LLOYD McAULAY, being duly sworn, deposes and says:

1. I am the attorney for both defendants-appellants, and am familiar with all the proceedings had herein.

2. No opinion has been rendered by the court appealed from in this case, except those which are included herein.

Lloyd McAulay
Lloyd McAulay

Sworn to before me this
28 day of March, 1966.
Rita L. Carrington

RITA L. CARRINGTON
NOTARY PUBLIC, State of New York
No. 41-0581325
Qualified in Queens County
Cert. filed in New York County
Term Expires March 30, 1967

CERTIFICATION BY ATTORNEY

Pursuant to Section 458 of the Code of Criminal Procedure and Section 2105 of the Civil Practice Law and Rules, the undersigned attorney for Defendants-Appellants, certifies that the foregoing record on appeal contains copies of the notices of appeal, complaints, minutes of the trial, minutes of the judgment rolls, and order and decision appealed from, and that the same has been compared by me with the originals and the same is a true and exact copy and transcript of the whole of such originals.

Lloyd McAulay

Lloyd McAulay

STIPULATION AS TO JOINT RECORD

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Term--First Department

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

WILLIAM SPROWAL, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

STEVEN GORDON,
Appellant.

WHEREAS, the above two cases were tried jointly, it is hereby

STIPULATED AND AGREED by and between the attorneys for the respective parties that the appeals in the above entitled matters may be heard upon a joint record and joint briefs.

Dated: March 23 1966.

Frank S. Hogan
per
District Attorney of New York County
Attorney for Respondent

Lloyd McAulay
Attorney for both appellants